Plaintiff argued, *inter alia*, that the working group was not eligible for legislative privilege because its activities were administrative in character. *Id.* at *3. The court found that "[l]egislative acts ... typically involve the adoption of prospective, legislative-type rules that establish a general policy affecting the larger population." *Id.* (quoting *Washington Suburban Sanitary Comm'n*, 631 F.3d at 184). The court then held that both entities in the working group existed to make recommendations on legislation and policy in their respective areas of expertise—pooling expertise, gathering information, holding public hearings, and proposing ordinances all qualified as participating in the legislative process. *Id.* at *4. As such, the working group's deliberations, correspondences, and the like regarding the zoning ordinance were protected by legislative privilege. *Id.* at *5.

Similarly, in *Pulte Home* the plaintiff alleged that a county's land use legislation was an unconstitutional taking of his property. *Pulte Home*, 2017 WL 2361167, at *1. The court held that the County Council was entitled to legislative privilege over materials related to its decision to enact the challenged ordinances. *Id.* at *4-5.

Furthermore, even if the Board of Supervisors or Planning Commission was considered an administrative, rather than legislative, actor, communications with third parties do not necessarily break legislative privilege. *See, e.g., Clayland Farm*, 2018 WL 4700191, at *5 (holding that "communications with third parties did not waive legislative privilege"); *Pulte Home*, 2017 WL 2361167, at *8 (finding that legislative privilege could survive disclosure to third parties because "[i]f the legislative privilege … is truly such that its importance is difficult to overstate … waiver cannot be premised on an action that courts have characterized as 'part and parcel' of the modern legislative process") (citing *Bruce v. Riddle*, 631 F.2d at 280). Thus, conversations between members of the Board of Supervisors and Planning Commission could still be withheld for privilege if only one of those bodies was deemed to be acting within the legislative sphere.[3]

[3] County staff who corresponded and/or answered questions about the ordinance could potentially claim legislative privilege as well. While we have yet to see any cases where local legislative or governmental staff try to invoke legislative privilege, one could analogize to cases involving federal and state legislators and their aides. For U.S. Congress, the "day-to-day work of [legislative] aides is so critical to the Members' performance that they must be treated as the latter's alter egos" for purposes of legislative privilege. *Gravel v. United States*, 408 U.S. at 616-17. The Virginia Supreme Court reached the same conclusion for state legislators, finding that when a non-legislator seeks to invoke legislative privilege, the threshold question is "whether the individual is functioning in a legislative capacity on behalf of and at the direction" of a legislator. *Edwards v. Vesilind*, 292 Va. at 532. Relevant factors include the individual's identity and relationship to the legislator. *Id.* Thus, where county staff were corresponding or answering questions about the ordinance on behalf of those who drafted, proposed, or enacted the ordinance, they could potentially claim legislative privilege. However, it is important to keep in mind that the staff correspondence would still need to fall within the scope of legislative activity, *i.e.* relate to the adoption of a legislative-type rule that establishes a general policy. If the staff correspondence relates to the ordinance, but is administrative or involves enforcement (*e.g.* personnel decisions, or the application of existing policy to a specific party or parcel), it would not be privileged.

5. Would discussion aimed at the impact or rationale of the ordinance or legislation be privileged?

Yes, barring extraordinary circumstances, such as those present in redistricting legislation, courts have expressly found that discussions about the rationale for proposed legislation are privileged.

In *Burtnick v. McLean*, for example, a former municipal employee sued the city and his supervisor under the Age Discrimination in Employment Act. 76 F.3d 611 (4th Cir. 1996). After a discussion of legislative privilege and immunity, the Fourth Circuit held that because the "existence of testimonial privilege is the prevailing law in this circuit," plaintiff's efforts to "establish a prima facie case will have to be accomplished without the testimony of members of the Board as to their *motives*" behind abolishing his job and establishing a new position. *Id.* at 613 (emphasis added).

Similarly, in *Hollyday v. Rainey*, the plaintiff sued a county Board of Commissioners claiming her constitutional rights to free speech and association were violated when the Board eliminated her position. 964 F.2d 1441, 1442 (4th Cir. 1991). The court explained that where a suit would require legislators to testify regarding conduct in their legislative capacity, "the doctrine of legislative immunity has full force." *Id.* at 1443. Here, plaintiff would necessarily have to show that her political affiliation was a determining factor in the Board's legislative decisions to prevail on her claims. *Id.* The Fourth Circuit held that legislative privilege shielded the legislators from being required to testify as to the motives animating their legislative actions. *Id.*

Courts have allowed discovery aimed at uncovering the motivation behind enacted legislation in certain circumstances, specifically in redistricting litigation. For example, in *Bethune-Hill*, plaintiffs sued the state Board of Elections challenging redrawn House Districts as an unlawful racial gerrymander in violation of the Equal Protection Clause. 114 F. Supp. 3d at 323. The plaintiffs sought, *inter alia*, all communications related to the redistricting process between members of the Virginia House of Delegates. *Id.* at 329-30.

Redrawing the House Districts was a legislative act, but the court found that state legislative privilege "may become qualified based on the nature of the claim at issue." *Id.* at 334. While legislative privilege "will normally still apply in civil suits brought by private plaintiffs to vindicate private rights," the privilege accorded to the legislators in this case is qualified because of "the important federal interests at play and the quintessentially public nature of the right" at issue in voting rights cases. *Id.* at 336. The court found, "Redistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present." *Id.* at 337.

Thus, the court in *Bethune-Hill* applied a five-part balancing test for its qualified privilege analysis, requiring certain productions from the defendants after examining "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of government in the litigation;" and (v) the purposes of the privilege." *Id.* at 338.

In the present case, we could perhaps analogize to *Bethune-Hill* and redistricting legislation in effort to force testimony or document production related to the motivation behind the new zoning ordinance. We could argue that "a judicially crafted evidentiary privilege based on federal common law" should not with absolute effect "trump the need for direct evidence that is highly relevant to the adjudication of public rights guaranteed by federal statutory law and the Constitution, especially where no threat to legislative immunity itself is presented."[4] *Id.* at 337. Here, we are alleging serious violations of federal law and the First Amendment, and the rationale behind the zoning ordinance—the local legislators' motivations—is directly relevant to our claims.

However, at least two cases within the Fourth Circuit involving plaintiffs alleging constitutional violations over county land use ordinances have found that these are efforts to vindicate *private* rights, thus making legislative privilege absolute, rather than qualified. *See Clayland Farm*, 2018 WL 4700191, at *2 (holding that plaintiff's use of its land pursuant to county laws were "private rights, therefore to the extent that legislative privilege applies, it is absolute"); *Pulte Home*, 2017 WL 2361167 (treating plaintiff's constitutional claims regarding land use legislation as efforts to vindicate private rights). Thus, to whatever extent we tried to use *Bethune-Hill* to compel production of documents pointing toward the County's rationales for the zoning ordinance, we would have to contend with this unfriendly precedent.

6. Have Defendants potentially waived legislative privilege by producing a number of internal communications regarding the 2016 ordinance?

Yes, defendants have possibly waived legislative privilege by producing internal communications regarding the 2016 ordinance. The legislative privilege can be waived by "explicit and unequivocal renunciations of the protection." *2BD Assocs.*, 896 F. Supp. at 535 (quoting *Helstoski*, 442 U.S. at 490-91). But that doesn't necessarily mean that a defendant must formally waive legislative privilege; a court may conclude that the privilege was waived by examining the defendant's conduct throughout the litigation. Local legislators may waive legislative privilege, *e.g.*, by (1) declining to assert the privilege; (2) voluntarily filing a complaint that involves issues protected by legislative privilege; and (3) making an unequivocal waiver of the protection from inquiry into their legislative motivation in the text of their complaint. *Fluvanna Cnty.*, 285 Va. at 589-90.

In *Fluvanna County*, the court found that the county Board of Supervisors waived legislative immunity because the Board never claimed "the protection of legislative immunity;" initiated litigation on matters surrounding its legislative actions that would require the Board to address issues concerning the motivation of its legislators; and supported its complaint by stating that the Board relied on alleged misrepresentations in voting to issue bonds, which would *necessarily* require assessment of its motivations in passing the legislation. *Id.* Thus, it is possible that by producing what would otherwise be privileged legislative material, Defendants in our case have renounced their legislative privilege. This argument would be strengthened if the Defendants

[4] In *Bethune-Hill*, the court noted that there is less threat to the purpose of legislative independence "when a legislator is not threatened with individual liability" and that the purpose of preventing legislators from distraction, standing alone, is not sufficient to " justify an *absolute* legislative privilege in instances where a legislator is not personally threatened with liability and an exercise of the privilege would frustrate the execution of federal laws protecting vital public rights." *Id.* at 334-35.

never expressly assert legislative privilege and if we show that aspects of the Defendants' arguments require inquiry into their legislative motivations.

7. Virginia is a "sunshine state" so that legislation, etc. has to be done in public. Does that impact the legislative privilege analysis?

That Virginia is a "sunshine state" does seem to potentially impact the analysis and might lead a court to require disclosure of information from closed governmental sessions relevant to this litigation, but it will probably *not* allow discovery of material that is subject to legislative privilege. *2BD Associates* is instructive here, as it involves application of Maryland's Open Meetings Act:

> Plaintiffs further seek discovery relating to what occurred in so-called closed governmental sessions. Any discovery sought from the County Commissioners, relative to statements made among the County Commissioners as to the 'purpose, formation, county-wide impacts, and impetus for Ordinance 93–02' are necessarily barred due to legislative immunity, and the 'closed meeting' factor does not alter that analysis. However, other discovery sought from those meetings, … will be allowed by this Court…. Since the matters at issue in the within litigation are not of the type which can properly be the subject of a closed meeting, the interests of our citizenry are better served by allowing inquiry into (1) whether anything relevant to this litigation, but not barred by legislative immunity, was discussed at closed governmental sessions and (2) if so, the content of what was said.

896 F. Supp. at 535-36. Virginia has a similar Open Meetings Law as part of its Freedom of Information Act. Thus, we could potentially compel production of materials from "closed meetings" that are relevant to this litigation, but probably could not override legislative immunity and force production of privileged materials.

8. Do legislators individually own the privilege, the legislative body, or both?

It appears that legislators control the privilege individually. In *Fluvanna County*, the court found that common law legislative privilege is meant to help protect the "independence of individual legislators." 285 Va. at 588. In *Bethune-Hill*, plaintiffs served the Virginia House of Delegates with production requests; the House then produced documents and served privilege logs reflecting other documents that it withheld on the basis of, *inter alia*, legislative privilege. 114 F. Supp. 3d at 330. The House sent notice to the twenty-nine delegates whose communications had been deemed relevant and privileged asking the delegates whether they intended to assert or wave that privilege—twenty-one requested to assert the privilege, four waived legislative privilege, and four failed to respond. *Id.* The House then produced the documents of the four legislators who waived, and the court ultimately held that the four delegates who failed to respond also effectively waived their legislative privilege. *Id.* at 330, 343. Thus, it appears that legislators individually control the privilege as to their own documents and testimony.

9. How does deliberative process privilege relate to legislative privilege?

The deliberative process privilege protects the disclosure of "documents reflecting advisory opinions, recommendations, and deliberations comprising part of the process by which

governmental decisions and policies are formulated." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 643 F. Supp. 2d 439, 441-42 (S.D.N.Y. 2009). In order for the deliberative process privilege to apply, a document must meet three requirements: (1) it must be inter- or intra-agency; (2) it must be pre-decisional; and (3) it must be deliberative. *See In re World Trade Ctr. Disaster Site Litig.*, 2009 WL 472250, at *2 (S.D.N.Y. Dec. 9, 2009).

Intra-agency documents are those that remain inside a single agency and inter-agency are those that go from one governmental agency to another. *Tigue*, 312 F.3d at 77. To meet the pre-decisional requirement, a document must have been "prepared in order to assist an agency decisionmaker in arriving at his decision." *NCLR*, 411 F.3d at 356. Lastly, a document must be deliberative, meaning it is related to the process by which an agency's policies are formulated. Courts will look at several factors to determine whether a document is deliberate, including whether: "(i) it formed an essential link in a specified consultative process, (ii) it reflects the personal opinions of the writer rather than the policy of the agency, and (iii) if released, would inaccurately reflect or prematurely disclose the views of the agency." *MTBE*, 643 F. Supp. 2d at 442. The privilege does not protect purely factual material "that is severable 'without compromising the private remainder of the documents.'" *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 739 F. Supp. 2d 515, 541 (S.D.N.Y. 2010).

Thus, legislative privilege and deliberative process privilege are distinct in a number of ways. Deliberative process privilege is "a shield with which the *executive branch* deflects public scrutiny into its internal processes. This qualified privilege protects deliberative material, such as advice, recommendations, and opinions, from disclosure in civil litigation, FOIA requests, and from Congress." Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 Nw. U. L. Rev. 1769, 1769–70 (2005) (emphasis added). Legislative privilege, by contrast, is derived from the Speech or Debate Clause for federal legislators. It is designed to protect *legislative activity* and to "safeguard legislative immunity." *Washington Suburban Sanitary Comm'n*, 631 F.3d at 181.

Deliberative process privilege more narrowly "covers documents reflecting advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Dept. of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 2 (2001). Its primary purpose is to prevent "chilled deliberation" and the "uninhibited formulation of policies;" thus, it focuses on documents reflecting advisory opinions, etc. and generally excludes documents reflecting the factual bases for these opinions unless they are "intertwined with the policy-making process." *Id.* Factual content is "excluded from the privilege because disclosure of such content would not curtail the robust and vigorous debate necessary to the formulation of policy." *Bethune-Hill*, 114 F. Supp.3d at 338. Legislative privilege, by contrast, broadly protects against discovery into all acts that occur within the "sphere of legitimate legislative activity." *Baker v. Mayor of Baltimore*, 894 F.2d at 681. This can include factual content considered in creating legislation and the motivations of the legislators themselves. *See Fluvanna County*, 285 Va. at 589 (finding that the motivations and discussions between county Board members surrounding their vote on bonds falls within the scope of legislative immunity). The "legislative privilege has a wider sweep [than deliberative process privilege] based on different purposes" and it includes the activity of "legislative fact-finding." *Bethune-Hill*, 114 F. Supp.3d at 338.

Where legislative privilege applies, it is generally absolute. *See, e.g., Bethune-Hill*, 114 F. Supp. 3d at 335 (finding that in "civil suits brought by private plaintiffs to vindicate private rights," the legislative privilege is absolute). When considering the qualified deliberative process privilege, conversely, courts often engage in a balancing test to determine whether and to what extent it applies, the most common version of that balancing test examines: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992).

Further, because of the importance of the legislative privilege, courts have held that it can survive disclosure to third parties. *See Bethune Hill*, 114 F. Supp.3d at 338-39 (finding that generally disclosure to third parties completely waives a privilege, but that "rule is less strict when applied to legislative privilege"); *see also Clayland Farm*, 2018 WL 4700191, at *5 (holding that "communications with third parties did not waive legislative privilege"); *Pulte Home*, 2017 WL 2361167, at *8 (finding that legislative privilege could survive disclosure to third parties because "[i]f the legislative privilege … is truly such that its importance is difficult to overstate … waiver cannot be premised on an action that courts have characterized as 'part and parcel' of the modern legislative process"). The deliberative process privilege will not survive voluntary disclosure to third parties. *See Elec. Frontier Found. v. Dep't of Justice*, 890 F. Supp.2d 35, 46 (D.D.C. 2012) ("[V]oluntary disclosure of privileged material ... to unnecessary third parties ... waives the [deliberative process] privilege….").

Applicant Details

First Name	**Meenu**
Last Name	**Mathews**
Citizenship Status	**U. S. Citizen**
Email Address	**mm5732@columbia.edu**
Address	**Address** Street **292 W 92nd Street** City **New York** State/Territory **New York** Zip **10025** Country **United States**
Contact Phone Number	**7326752761**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Foundation Moot Court (Participant; Student Editor)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Liebman, Benjamin
bl2075@columbia.edu
212-854-0678

Effron, Robin
robin.effron@brooklaw.edu
(718) 780-7933

Metzger, Gillian
gmetzg1@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Meenu Mathews
292 West 92nd Street
New York, NY 10025
(732)-675-2761
mm5732@columbia.edu

June 8, 2023

The Honorable Kiyo Matsuomoto
United States District Court
Eastern District of New York
225 Cadman Plaza East Brooklyn
New York, NY 11201

Judge Matsumoto:

I am a recent graduate of Columbia Law School, and I write to apply for a clerkship in your chambers beginning October 2025 or any later term thereafter.

During my time at Columbia Law School, I have developed my research and writing skills both inside and outside the classroom. Through an externship with the NAACP Legal Defense & Education Fund, I gained exposure to litigation at both the district and appellate level by researching complex legal issues and drafting documents used in litigation. I have continued to develop these skills as a research assistant, academic coach, and student editor for the Foundation Moot Court Legal Practice Workshop. As the Executive Articles Editor of the *Columbia Human Rights Law Review*, I led a team of editors to select articles for publication. The skills I have developed in these roles, including my ability to work efficiently under pressure, will serve as an asset to chambers.

I know that a clerkship is an opportunity to find mentorship while developing my legal skills. As a South Asian American woman, and the first in my family to attend law school, I did not grow up around lawyers. In fact, I would not have seen myself in the profession if not for strong mentors encouraging me to pursue a career in law. As I have navigated law school, I have made every effort to push for inclusivity in the field, form helping lead non-profits dedicated to supporting students from underrepresented groups to serving as the Mentorship Chair for Empowering Women of Color (EWOC) at the law school. Given your background and experiences, it would be an honor to serve as your clerk.

Enclosed please find a resume, transcript, and a writing sample. Following separately are letters of recommendation from Professors Gillian Metzger (646-530-0640, gmetzg1@law.columbia.edu), Benjamin Liebman (212-854-0678, bl2075@columbia.edu), and Robin Effron (718-780-7933, rje2104@columbia.edu). Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,
Meenu Mathews

MEENU MATHEWS

292 West 92nd Street, New York, NY 10025 • (732) 675-2761 • mm5732@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D., expected May 2023

Honors:	James Kent Scholar; Harlan Fiske Stone Scholar
Activities:	*Columbia Human Rights Law Review*, Executive Articles Editor
	Teaching Fellow (Prof. Benjamin Liebman, Torts, Fall 2021)
	Student Editor (Legal Practice Workshop, Spring 2023)
	Academic Coach (Civil Procedure, Constitutional Law, Torts)
	Columbia Clerkships Diversity Initiative
	Empowering Women of Color, Membership Chair
	Co-Director, Law School Mastery Pipeline Program

The George Washington University, Washington, DC
B.A., *summa cum laude*, International Affairs, received May 2018

Honors:	Student Commencement Speaker
	Presidential & Honors Scholar
Internships:	The White House, Office of Public Engagement, Summer 2016
	CNN, The Lead With Jake Tapper; Programming & Content Strategy, Summer & Fall 2017
	Administrative Office of the U.S. Courts; Hiring & Special Programs, Summer 2015
	New Jersey Courts, Middlesex County Court Presiding Judge Jamie Happas, Summer 2018
Activities:	Student Association, Vice President of Public Affairs
	Mock Trial
Study Abroad:	London School of Economics, London, UK, Fall 2016–Spring 2017

EXPERIENCE

Davis, Polk, & Wardwell, New York, NY — New York, NY
Summer Associate (offer extended) — May 2022-August 2022
Drafted court documents and correspondence with opposing counsel in three complex litigation and restructuring matters. Drafted witness memos and researched legal issues related to ongoing government investigations.

NAACP Legal Defense & Educational Fund — New York, NY
Extern — September 2021-May 2022
Drafted portion Ninth Circuit brief on client's 1983 claims. Assessed merits of bringing Fourteenth Amendment and *Monell* claims to support ongoing investigations into bias-related incidents by law enforcement agencies. Researched and evaluated potential expert witnesses for ongoing appellate litigation.

Department of Justice, Washington, DC
Legal Intern, Civil Rights Division — July 2021–August 2021
Drafted four memoranda related to ongoing policy projects related to civil rights, including anti-protest legislation and recent hate crimes legislation. Researched federal government's actions related to artificial intelligence in housing. Prepared a presentation for the Criminal Section regarding gender-based hate crimes.

White & Case LLP, Washington, DC
1L Summer Associate (touchback completed in August 2022; offer extended) — May 2021–July 2021

Sard Verbinnen & Co., New York, NY
Associate, Junior Associate — September 2018–August 2020
Advised 35 public and private companies on corporate crises, reputational risk, and public relations.

LANGUAGES: Malayalam (fluent), French (intermediate)
INTERESTS: *New York Times* crossword, yoga, cooking global cuisine, listening to NPR podcasts

Columbia Law School

Registration Services

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CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Meenu Mathews

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-2	Antitrust and Trade Regulation	Wu, Timothy	3.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L6269-1	International Law	Cleveland, Sarah; Clooney, Amal	4.0	A
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6423-1	Securities Regulation	Fox, Merritt B.	4.0	B+
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6422-1	Conflict of Laws	Monaghan, Henry Paul	3.0	B+
L6425-1	Federal Courts	Metzger, Gillian	4.0	A
L6655-1	Human Rights Law Review		0.0	CR
L6680-1	Moot Court Stone Honor Competition [Minor Writing Credit - Earned]	Bernhardt, Sophia	0.0	CR
L6274-3	Professional Responsibility	Rose, Kathy	2.0	B+
L9181-1	S. Asian Americans and the Law	Chin, Denny; Lee, Thomas	2.0	A-

Total Registered Points: 11.0

Total Earned Points: 11.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Talley, Eric	4.0	A
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	B+
L6655-1	Human Rights Law Review		0.0	CR
L6169-1	Legislation and Regulation	Metzger, Gillian	4.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Ponsa-Kraus, Christina D.	2.0	CR
L6683-2	Supervised Research Paper	Johnson, Olatunde C.A.	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	A-
L6611-1	Ex. Racial Justice	Kleinman, Rachel; Merle, Natasha	2.0	A
L6611-2	Ex. Racial Justice - Fieldwork	Kleinman, Rachel; Merle, Natasha	3.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6675-1	Major Writing Credit	Johnson, Olatunde C.A.	0.0	CR
L6683-1	Supervised Research Paper	Johnson, Olatunde C.A.	2.0	CR
L6822-1	Teaching Fellows	Liebman, Benjamin L.	4.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Hamburger, Philip	4.0	A-
L6108-2	Criminal Law	Harcourt, Bernard E.	3.0	B+
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6130-7	Legal Methods II: Building Legal Change: Moving Advocacy Outside of Court	Hechinger, Scott; Rodriguez, Alejo; Shanahan, Colleen F.	1.0	CR
L6121-1	Legal Practice Workshop II	Harwood, Christopher B	1.0	HP
L6116-1	Property	Scott, Elizabeth	4.0	B+
L6912-1	Transnational Litigation	Bermann, George A.	3.0	A

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Effron, Robin	4.0	A
L6105-1	Contracts	Kraus, Jody	4.0	B+
L6113-2	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-1	Legal Practice Workshop I	Harwood, Christopher B; Neacsu, Dana	2.0	P
L6118-2	Torts	Liebman, Benjamin L.	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 84.0

Total Earned JD Program Points: 84.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	3L
2021-22	James Kent Scholar	2L
2020-21	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	1.3

June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am delighted to write in very strong support of Meenu Mathews' application for a clerkship in your chambers. Meenu will be an outstanding clerk.

Meenu was a student in my torts class during the fall of 2020. Meenu asked the best questions of any student in the class. Many students struggle to separate legal issues in torts from policy questions. Meenu saw these policy implications immediately and excelled at thinking beyond the doctrine to analyze societal issues that lie behind the cases we examine in the first-year torts curriculum. Meenu was unusually perceptive in seeing the link between torts litigation and broader questions of how civil litigation can both advance and impede social justice. Meenu did well in torts and in law school generally, earning academic honors every year.

Based on her performance in torts I asked Meenu to be a teaching assistant for a large section of torts during the fall of her 2L year. Again she excelled, helping students with doctrine and with adjusting to life in law school. I meet with my TAs weekly, and Meenu was very good in these meetings at making sure we went over the doctrinal points we had covered in class that week and also the policy implications. She has done well throughout law school, excelling in notoriously difficult courses such as Federal Courts. She also served as a Student Editor for our One L Legal Practice Workshop, where she helped train One Ls in writing briefs.

Outside of class, Meenu has shown her dedication to using the law to address inequities in our legal system and society. She has externed for the NAACP Legal Defense & Education Fund, has interned in the Civil Rights Division at DOJ, and has served as executive articles editor on the Columbia Human Rights Law Review. As the child of immigrants, she is deeply committed to diversifying the legal system. She served as a leader of Columbia Law School's Empowering Women of Color and has also directed PracticePro, an organization that seeks to expand the pipeline of students attending law school (and to support them while at law school). Prior to law school, she worked at a crisis management firm where, despite being just out of college, she helped in efforts to convince top management to address issues of diversity and inclusion within the firm (as well as with the firm's clients).

Meenu aims to pursue a career as a litigator. She will be beginning her career this fall at Davis Polk but sees herself shifting to the public sector in a few years. Meenu is a wonderful person and a great team player. She will be a great lawyer, and would be a fantastic clerk.

Please do not hesitate to let me know if you require any additional information.

Sincerely,

signature

Benjamin L. Liebman

Benjamin Liebman - bl2075@columbia.edu - 212-854-0678

ROBIN J. EFFRON
PROFESSOR OF LAW

June 6, 2023

To Whom It May Concern:

I am writing to recommend Meenu Mathews for a clerkship in your chambers.

Ms. Mathews was a truly outstanding student in my Fall 2020 civil procedure class at Columbia Law School where I taught as a visiting professor. She earned one of the highest A grades in the class on the final exam. Her exam reflected excellent writing ability as well as a solid mastery of the subject matter as tested in both essay and multiple choice. Ms. Mathews was a frequent and energetic contributor to class discussion. She often volunteered answers and thoughts in the general discussion and was well-prepared for her days "on call." Our remote learning experience utilized Zoom breakout rooms and I know that Ms. Mathews was an enthusiastic participant and leader in these group exercises and discussions, both from my observations when I "dropped in" and from the glowing comments of my teaching assistants who helped to facilitate those discussions.

Ms. Mathews was also very active in posting on the class discussion boards. These asynchronous forums were an important part of keeping the students connected to each other and to the material during our semester of remote learning. I appreciated the time and care she put into her comments, and the thoughtfulness with which she engaged with others.

In a semester in which it was particularly difficult to get to know students on a personal basis, it was my pleasure to engage with Ms. Mathews in a manner that was so enjoyable that I almost forget that we did not meet in person until nearly a year later in the fall of 2021. Ms. Mathews was a regular visitor to my Zoom office hours, during which she used the reading and lecture materials to cultivate broader discussions about litigation and its role in regulation and enforcement. Like many first-year law students, Ms. Mathews had a general sense that she was interested in litigation but was unsure of what a career as a litigator might mean. She also used our discussion of cases as a springboard to interrogate many of the underlying substantive law principles behind those disputes. In the years since she was my student, it has been my pleasure to see Ms. Mathews sharpen her interests and begin to craft a path toward a position as a government litigator in several possible capacities.

I also know that Ms. Mathews has been interested in a judicial clerkship for quite some time. During her 1L year, she helped organize a panel for the Law Women organization that featured Columbia Law School professors talking about their experiences as federal judicial clerks. I was very impressed with the event. Among other things, Ms. Mathews made sure that

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ROBIN J. EFFRON
PROFESSOR OF LAW

there were professors who had clerked for district and appellate judges as well as Supreme Court justices. It impressed me that she recognized that these are different experiences and that students would benefit from hearing about different types of clerkship experiences. She moderated the panel along with a classmate, asking questions about our experiences that helped elucidate our day-to-day experiences as clerks, as well as the long-term benefits of a clerkship. It is notable that she exercised such able stewardship over this type of event in her first semester of law school.

In my observation, Ms. Mathews would be a superb asset to any chambers. Her warmth was evident even in our remote learning environment. She is collegial and inquisitive. She is firm in her core beliefs, but treats other points of view with respect and genuine interest. I have no doubt that she will be a successful lawyer and make many contributions to the public, whether it is through a position with the federal government, or by continuing to engage earnestly with colleagues in both formal and informal settings.

Ms. Mathews has my highest recommendation. Please do not hesitate to contact me with any further questions or concerns.

Sincerely.

/s/ Robin Effron

Robin Effron

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June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Meenu Mathews, a 2023 Columbia Law School graduate, for a clerkship in your chambers. Meenu is an extremely intelligent, thoughtful, and mature young lawyer with impressive analytic abilities. I am confident that she will be an outstanding law clerk and recommend her with the greatest enthusiasm.

I taught Meenu in two classes during her time at Columbia: Legislation and Regulation in her 2L spring, and Federal Courts in her 3L fall. She excelled in both, earning straight As. Meenu's performance in LegReg was particularly impressive. From early on, her class comments showed a sophisticated and nuanced understanding of the material. Her analytic abilities were exceptional; she stood out for her ability to see complications and tensions among different lines of doctrine as well as to identify and assess their underlying assumptions. I was also struck by how effectively she articulated her points. And her exam was off-the-charts good, one of the two best I received in the class. It was not just analytically sharp, but extremely well written — demonstrating the same clarity, concision, and effective presentation of her oral comments. I was so impressed by Meenu's class performances that I asked her to TA for me in the spring, but unfortunately, my going on government leave meant that I didn't get a chance to work with her in that role.

Meenu displayed the same strengths in Federal Courts. It was a larger class with fewer opportunities for in-class participation, but even so, Meenu's comments stood out for their analytic insights and eloquence. Again she wrote an extremely strong, well-written exam, excelled at both the issue spotters and the policy questions, and demonstrated a very sophisticated grasp of complicated doctrines.

Over the course of the two semesters I taught Meenu, I had a chance to meet with her a couple of times in office hours. I enjoyed all of our interactions. She displayed the same poise and eloquence in our conversations as I saw in class, and has a quiet self-confidence, warmth, and overall good humor that makes spending time with her a real treat. I am confident you would find her a wonderful addition to your chambers.

Please do not hesitate to contact me if there is any further information on Meenu I can provide.

Very truly yours,

Gillian E. Metzger

Gillian Metzger - gmetzg1@law.columbia.edu

ACCOUNTABILITY AS A REMEDY FOR INVISIBILITY: USING FEDERAL IMPLIED RIGHTS OF ACTION TO ENJOIN PROSECUTORIAL INDIFFERENCE IN HATE CRIME PROSECUTIONS

Meenu Mathews

L9181-1: Asian Americans and the Law

December 22, 2022

Introduction

"I look over my shoulder and wonder if there are people who want to hurt me because I am Asian American. I simply no longer feel safe or welcome in this city I have loved for so many years."[1] Those were words Mr. Anh Lê drafted as part of a victim impact statement after he was violently attacked in San Francisco. The two white men who attacked him proceeded to engage in two separate attacks on Asian Americans in the hours following their attack on Mr. Lê. But despite the clear bias implicated in these incidents, and Mr. Lê's right to be heard following the attack, the San Francisco District Attorney's Office did not consult him before offering his attackers a lenient plea deal. This is not an isolated incident. As hate crimes against Asian Americans in the United States has spiked,[2] prosecutors' offices across the country have failed to properly prosecute them, expressing indifference to victims. Victims are first subject to violence based on their identity; then, when they seek justice, those tasked with defending the law fail to hold their perpetrators accountable.

This paper seeks to explore the limits of prosecutorial discretion and immunity in this realm, identifying potential avenues for relief when prosecutors exhibit indifference in charging hate crimes. First, I will briefly outline violence against Asian Americans, especially in the wake of the COVID-19 pandemic. Second, I will examine federal and state hate crimes statutes, and the barriers of prosecuting hate crimes under those statutes. Finally, I will consider a victim-centered approach to pushing for accountability and structural change by filing suits based on traditional federal rights of action, such as *Ex Parte Young* and 28 U.S.C. § 1983.[3] This path to

[1] Complaint at 13, Lê v. Boudin, No. 3:22-cv-477 (N.D. Cal. Jan 24, 2022) ECF 1 [hereinafter Lê Complaint]
[2] *See* Nicole Chavez & Natasha Chen, *Assaulted. Harassed. This is the reality for Asian Americans a year after the Atlanta spa shootings*, CNN (Mar. 16, 2022), https://www.cnn.com/2022/03/16/us/atlanta-spa-shootings-anniversary/index.html.
[3] Recently, King & Spalding attorneys filed such a claim in the Northern District of California on behalf of Mr. Lê, alleging Fourteenth Amendment violations. The complaint was voluntarily dismissed but provides an opportunity to consider the viability of these claims and the policy goals they echo.

litigation. While these claims cannot force prosecutors to press hate crime charges in an individual plaintiff's case, they can lead to larger discussions surrounding the role that district attorneys' offices play in protecting the rights of victims.

I. Background: Hate Crimes Against Asian Americans

"Kung Flu."[4] The "Chinese Virus."[5] As cases of COVID-19 rose in 2020, President Trump and members of his administration repeatedly used anti-Asian rhetoric in discussing the pandemic. These words had consequences. New York Police Department (NYPD) statistics show that at least 131 incidents were motivated by Anti-Asian bias in 2021.[6] The California Department of Justice noted that incidents motivated by Anti-Asian bias rose 177.5% from 89 in 2020 to 247 in 2021.[7] This has had a lasting impact on Asian American communities—an April 2021 survey found that 32% of Asian American adults feared threats or physical harm due to race.[8]

Violence against Asian Americans is not a new phenomenon.[9] Early violence was perpetuated by legal systems excluding Asian Americans. For example, a California statute passed in the 1850s prevented people of color, including Asian Americans, from testifying

[4] *See* Katie Rogers, Lara Jakes, and Ana Swanson, *Trump Defends Using 'Chinese Virus' Label, Ignoring Growing Criticism*, N.Y. TIMES (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/us/politics/china-virus.html.
[5] *Id*.
[6] *See* Nicole Chavez & Natasha Chen, *Assaulted. Harassed. This is the reality for Asian Americans a year after the Atlanta spa shootings*, CNN (Mar. 16, 2022), https://www.cnn.com/2022/03/16/us/atlanta-spa-shootings-anniversary/index.html. Note, numbers collected by law enforcement agencies are likely lower than actual incidents due to underreporting and under-identification. For a full discussion of underreporting, *see infra* Section II.B.1.
[7] *Hate Crimes in California*, Cal. Dep't of Just. 2 (June 28, 2022), https://oag.ca.gov/system/files/attachments/press-docs/Hate%20Crime%20In%20CA%202021%20FINAL.pdf.
[8] Neil G. Ruiz, Khadijah Edwards, and Mark Hugo Lopez, "One-third of Asian Americans fear threats, physical attacks and most say violence against them is rising," Pew Research Center (Apr. 21, 2021), available at https://www.pewresearch.org/fact-tank/2021/04/21/one-third-of- asian-americans-fear-threats-physical-attacks-and-most-say-violence-against-them-is-rising/.
[9] This paper focuses specifically on how the legal system has failed Asian Americans following violent attacks. For a broader discussion of the history of violence against Asian Americans, *see generally* Denny Chin & Kathy Hirata Chin, *"Kung Flu": A History of Hostility and Violence Against Asian Americans*, 90 Fordham L. Rev. 1889 (2022); *see also See* Scott Zesch, *The Chinatown War: Chinese Los Angeles and the Massacre of 1871* 136-44, 153 (2012).

against any white individual.[10] In cases like *People v. Hall*, the testimony of Chinese individuals was inadmissible against a white man who murdered a Chinese victim.[11]

While the law has evolved, it has failed to provide proper recourse to Asian American victims. A prime example is the murder of Vincent Chin, after which prosecutors attempted to charge hate crimes for the first time in a case involving an Asian American.[12] The defendants in that case were charged with second-degree murder, but pled guilty and no contest to a reduced charge of manslaughter, implying no intent to kill Chin.[13] Chin's case led to a push for certain rights for victims—including the right to notice and an opportunity to be heard during the trial and sentencing phases against a perpetrator.[14]

Still, these laws have not effectively protected Asian Americans from violence. As the Asian American Bar Association of New York (AABANY) noted in a report on violence against Asian Americans in New York published earlier this year, "in the 40 years since Vincent Chin's murder, the prosecution of Asian hate crimes has rarely been a part of the larger mainstream conversation about hate crimes."[15]

II. The Difficulties of Prosecuting Hate Crimes

A. Federal and State Hate Crime Statutes

The federal government and states share concurrent jurisdiction over hate crime prosecution. There are many federal statutes aiming to enable hate crime prosecution. For example, 18

[10] *People v. Hall*, 4 Cal. 399, 399 (1854).
[11] *Id*. at 405.
[12] PAULA YOO, "FROM A WHISPER TO A RALLYING CRY: THE KILLING OF VINCENT CHIN AND THE TRIAL THAT GALVANIZED THE ASIAN AMERICAN MOVEMENT" (W.W. Norton & Co. 2021).
[13] *United States v. Ebens*, 800 F.2d 1422 (1986). Prosecutors alleged that defedants violated 18 USC 245(b)(2)(F), which protects any person from intimidation in public places because of "race, color, religion, or national origin"
[14] *Id*; *see also* Karen Grigsby Bates, *How Vincent Chin's Death Gave Others A Voice*, NATIONAL PUBLIC RADIO (Mar. 27, 2021), https://www.npr.org/sections/codeswitch/2021/03/27/981718272/how-vincent-chins-death-gave-others-a-voice.
[15] *Id*.

U.S.C. § 241 and 242 prohibit conspiracy to deprive another of federally-protected rights and willful deprivation of federally-protected rights under color of law.[16] Causing willful "injury, intimidation or interference because of "race, color, religion or national original" or involvement in certain protected activities" is prohibited under 18 U.S.C. § 245.[17] In 2009, President Obama signed 18 U.S.C. § 249, the Matthew Shepard and James Byrd Hate Crimes Prevention Act (HCPA), which sought to modernize federal hate crimes statutes to include bias crimes motivated by gender, gender identity, sexual orientation, and disability.[18] Most recently, President Biden signed the COVID-19 Hate Crimes Act in May 2021.[19] The statute does not create new causes of action in prosecuting hate crimes, but provides for expedited Department of Justice review of COVID-19 related hate crimes.[20] It also urges the federal government to issue guidance to state and local agencies regarding how to create online strategies to report such hate crimes.[21]

While federal statutes exist, most hate crimes are addressed at the state or local level.[22] Each state's statutes vary, but many states have adopted an enhanced penalty approach. This approach—employed by New York,[23] California,[24] and Georgia[25]—allows prosecutors to first charge an individual with crimes, and then classify existing charges as hate crimes before trial.

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[16] 18 U.S.C. §§ 241-242 (1988).
[17] 18 U.S.C. § 245 (1988).
[18] Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249 (2009)
[19] Covid-19 Hate Crimes Act, Pub. L. No. 117-13, 135 Stat. 265.
[20] *Id*.
[21] This legislation was opposed by over seventy-five Asian and LGBTQ organizations, who argued that it served to increase crime statistics collection. *See 100+ Asian and LGBTQ Organizations' Statement in Opposition to Law Enforcement-Based Hate Crime Legislation*, Reappropriate (May 21, 2021), http://reappropriate.co/2021/05/75-asian-and-lgbtq-organizations-statement-in-opposition-to-law-enforcement-based-hate-crime-legislation/.
[22] Peter G. Berris, Cong. Rsch. Serv., OVERVIEW OF FEDERAL HATE CRIME LAWS 2 (2022).
[23] *See* N.Y. Penal Law § 485.05.
[24] *See* Cal. Penal Code sections § 422.55 (designating hate crimes as a criminal offense and imposing enhanced penalties when an individual commits an offense while motivated by bias against protected classes).
[25] Ga. H.B. 426 § 1(b) (allowing prosecutors to classify existing charges as hate crimes before trial. When a crime is designated a hate crime, a jury first determines guilt and then considers whether it is a hate crime.).

B. Barriers to Hate Crime Prosecution

Despite both federal and state legislation to address hate crime prosecution, various obstacles preclude effective prosecution, including: (1) the burden of proving bias-related motive, (2) underreporting and under-identification, and (3) prosecutorial discretion.

1. Proof of Motive

Both federal and state hate crime statutes typically require proof of bias-related motive in committing a crime. The federal hate crimes statutes require that bodily injury is caused *because of* a protected characteristic.[26] The level of proof needed to demonstrate that a crime was caused "because of" bias is unresolved, which can lead to different outcomes based on venue.[27] Proposed legislation has sought to amend the language of § 249 to require that bias be a "contributing motivating factor" but has not been signed into law.[28] Most state statutes have replicated a motive requirement. For example, the New York hate crime statute requires that a person intentionally selects a victim "in whole or in substantial part" because they believe the individual has a protected characteristic.[29] Motive is difficult to prove—perpetrators may be motivated by multiple factors, and this burden of proof can be difficult to meet absent explicit racial slurs.

2. Underreporting and Under-identification

Hate crimes against Asian Americans are underreported and under-identified. AAPI hate crime victims were 39% less likely than Hispanic or Black hate crime victims and 54% less

[26] For example, a Congressional overview of how to prove a hate crime under 28 U.S.C. § 249 outlines three elements: (1) bodily injury; (2) *because of* actual or perceived religion, race, or national origin; and (3) involve some element of commerce. Berris, *supra* note 21 at 36 (emphasis added).
[27] *Id*. at 4. The source compares Eighth Circuit precedent, requiring that race or national origin are just a substantial motivating factor and Sixth Circuit precedent, requiring the government establish but-for causation.
[28] Stop Hate Crimes Act of 2021, H.R. 2416, 117th Cong. (2021).
[29] N.Y. Penal Law § 485.05.

likely than white victims to report a hate crime.[30] Even when these crimes are reported, law enforcement agencies and prosecutors may not identify them as hate crimes. As Byung Pak, a former U.S. attorney representing the family of one of the victims of the Atlanta spa shootings, stated: there is a tendency to categorize hate crimes when "we see swastikas or Nazi symbols or salutes. In the Asian American community there's not something that unifying that everybody understands as something that's geared towards, intimidating, or trying to hurt the AAPI community." [31]

In fact, the aggregation of Asian American communities can lead to systemic oversight when these crimes do occur. For example, Asian Americans are often aggregated into the "model minority stereotype."[32] In reality, the Asian American community consists of many non-English speakers who may have trouble communicating with law enforcement agencies when translators are unavailable.[33] Flattening the Asian American experience can lead to an inability to identify these hate crimes even when prosecutors can easily prove requisite motive. This can lead to labeling hate crimes as assault or battery, creating a cycle in which bias-related incidents are not incorporated as hate crime statistics. Such a cycle prevents systemic acknowledgement that resources should be pooled into prosecuting and preventing hate crimes against Asian Americans.

3. Prosecutorial Discretion

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[30] Brendan Latz & Marin R. Wenger, *Are Asian Victims Less Likely to Report Hate Crime Victimization to the Police? Implications for Research and Policy in the Wake of the COVID-19 Pandemic* 1, CRIME & DELINQ. (2021).
[31] *See* Chavez & Chen, *supra* note 5.
[32] For a detailed examination of how the "model minority" myth affects hate crime reporting, *see, e.g.*, Margaret M. Chin and Yung-Yi Diana Pan, *The 'model minority' myth hurts Asian Americans*, WASH. POST (Apr. 21, 2021); Patrick Park, Opinion, *I'm Done Being Your Model Minority*, N.Y. TIMES (Mar. 10, 2022).
[33] For example, in San Francisco, about 43% of Asians in non-English speakers, a third are foreign-born and 13% are not U.S. citizens. Lê Complaint, *supra* note 1 at 2 (citing Marco della Cava, "*Asian Americans in San Francisco are dying at alarming rates from COVID-19: Racism is to blame*," USA TODAY (October 18, 2020)).

Even when hate crimes are reported and motive exists, prosecutors have immense discretion over whether to press hate crime charges. Prosecutors generally have broad discretion at every step of charging and sentencing any crime, including deciding which charges to bring.[34] This discretion, paired with the absolute immunity for advocacy functions,[35] create a system in which prosecutors pay a crucial role in whether and how perpetrators are brought to justice.[36]

Prosecutorial indifference towards hate crimes against the Asian American community has been widely documented.[37] Cases that have been prosecuted as hate crimes have resulted from widespread social media outrage and urging from organizations dedicated to protecting the rights of Asian Americans.[38] In many documented cases, prosecutors' offices ignore the requests and rights of victims, even as the number of hate crimes against Asian Americans have spiked.[39] In June 2022, AABANY published a report on violence against Asian Americans in New York, citing that only 3% of reported bias-related incidents are prosecuted as hate crimes.[40] This failure

[34] Both state and federal prosecutors have immense discretion. While state protections vary, for a discussion of federal prosecutorial discretion, *see* U.S. Dep't of Just., Just. Manual § 9-27.000 (2022) (stating that "under the federal criminal justice system, the prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts.").
[35] *See, e.g.*, *Imbler v. Pachtman*, 424 U.S. 409 (1976).
[36] As King & Spalding attorneys noted in filing a complaint in the Northern District of California, while the results of underpolicing are being identified, prosecutorial power can cause similar harm when "applied in an unequal manner depending upon immutable characteristics of the victim, such as race and national origin." Lê Complaint, *supra* note 1 at 24.
[37] *Endless Tide: The Continuing Struggle to Overcome Anti-Asian Hate in New York*, Asian American Bar Ass'n of N.Y. (Feb. 24, 2022), https://cdn.ymaws.com/www.aabany.org/resource/resmgr/aavtf/Endless_Tide_Report_2022_FIN.pdf [hereinafter *Endless Tide Report*] (stating that "prosecutions of matters involving anti-Asian violence are often marked with indifference and inaction on the part of state prosecutors and law enforcement…even competent legal counsel and properly documented evidence often are not enough to compel prosecutors to investigate and prosecute crimes"); Lê Complaint, *supra* note 1 at 2 (stating that victims "was ignored [and] made to feel invisible" by prosecutors in San Francisco.)
[38] In one illustrative case, AABANY note that Patrick Mateo—one of few perpetrators of New York City violence who was charged with a hate crime— was not arrested until two days after the incident, following social media reports of his actions.[38] Even after his arrest, law enforcement officials stated that the incident was "not currently being investigated as [a] hate crime" because his "motives…were unclear." Only three months later, following various calls to action to the Queens District Attorney's Office, was Mateo was finally charged with a hate crime.
[39] *See, e.g., Endless Tide Report*, *supra* note 36 at 34-37.
[40] *Id*.

to prosecute creates double-tiered harm for Asian Americans: after suffering violence in the form of hate crimes, they face an indifference from legal actors.

4. Barriers to Prosecution Lead to Patchwork Prosecutions

Barriers to prosecution create patchwork solutions to the rampant hate crimes against the Asian American community. One example is the Atlanta Spa Shootings—On March 16, 2021, Robert Aaron Long killed eight people across three massage parlors across Georgia's Fulton and Cherokee Counties.[41] Six of the eight victims were Asian women.[42] Following the murder of Ahmaud Arbery in 2020, Georgia's legislature passed an enhanced penalty hate crime statutes, whereby lawyers can categorize charges as hate crimes prior to trial.[43]

Federal prosecutors did not press any charges.[44] While Long was charged in both counties, Cherokee County prosecutors argued that requisite motive did not exist to charge a hate crime, and agreed to a plea deal where Long was sentenced to four life sentences without parole.[45] On the other hand, Fulton County prosecutors are seeking to charge Long under the enhanced penalty hate crimes act, which would impose the death penalty.[46]

Even on identical facts, prosecuting crimes that are clearly motivated by Anti-Asian bias leads to disparate results. In this case, even though the shootings were not categorized as a hate crime, Long was punished. But in many cases, law enforcement officials and prosecutors have ignored victims' rights in dismissing or lowering potential charges. In the absence of effective

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[41] *Eight Dead in Atlanta Spa Shootings, With Fears of Anti-Asian Bias*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth.
[42] *Id*.
[43] Ga. H.B. 426 § 1(b).
[44] *See* Chavez & Chen, *supra* note 6 (citing a Justice Department official stating that "the federal investigation of the Atlanta spa shootings remains open as officials continue monitoring the state cases.").
[45] *Atlanta-area spa shooter to serve 4 life sentences in Cherokee County slayings*, NBC NEWS (July 27, 2021), https://www.nbcnews.com/news/us-news/atlanta-area-spa-shootings-suspect-pleads-guilty-cherokee-county-charges-n1275139.
[46] *Id*.

federal or state avenues for seeking hate crime prosecutions, and the presence of prosecutorial indifference, it is important to consider avenues by which victims can hold prosecutors accountable.

III. Solution: Using Federal Law to Combat State Failure to Prosecute Violence Against Asian Americans to Push for Structural Change

Hate crimes statutes do not fully capture the wide array of bias-based incidents against Asian Americans, and prosecutorial immunity paired with broad discretion lead to a lack of accountability. What limits—if any—exist on prosecutorial discretion in handling bias-related incidents? Prosecutors, like all government officials, are subject to certain external, Constitutional limits. For example, the Fourteenth Amendment guarantees individuals equal protection and due process of the law.[47] Various statutes enshrine the values of the Fourteenth Amendment—for example Title VI of the Civil Rights Act prohibits "discrimination on the basis of race, color, or national origin in any program or activity that received federal funds."[48] However, suing directly under these statutes can prove futile, because litigants will need to prove either (1) intentional discrimination or (2) proof of disparate impact.[49] Given the breadth of prosecutorial discretion, even where immunity does not bar suit, it will be difficult to produce the statistics required to demonstrate disparate impact.

There are also "victims' bills of rights" protecting victims of crime. These laws place certain procedural boundaries on prosecutorial power, while preserving the prosecutor's discretion to press charges. Many of these laws seek to preserve due process for victims wake of a crime,

[47] U.S. CONST. amend. XIV.
[48] 42 U.S.C. §§ 2000d – 20000d-7. Most district attorneys' offices receive federal funds.
[49] Title VI Legal Manual (U.S. Dep't of Just. Fed. Coordination & Compliance Section 2021). An individual may need to show specific statistics showing that an individual in a "similarly situated" position would not be treated the same way.

including providing victims notice and an opportunity to be heard.[50] In California, Marsy's Law affords "due process" rights to victims during prosecution, sentencing, and release of their perpetrators.[51] Similarly, New York guarantees victims the right to be notified of criminal proceedings, sentencing, and release of perpetrators.[52] As seen in the wake of hate crimes against Asian Americans, prosecutors' offices have demonstrated an unwillingness to follow these procedures. These statutes do not create a private right of action. But when these laws are not followed, prosecutors fail to provide due process of the law and equal protection guaranteed by the Fourteenth Amendment. When state or local actors violate constitutional rights, victims can sue based on implied rights of actions that constitutional rights are violated under 28 U.S.C. § 1983 or the doctrine of *Ex Parte Young.* Because there is a specific law preserving rights, victims will not run into the issues that Title VI disparate impact claims may raise. These litigation strategies cannot guarantee that hate crimes are charged. However, they can help demand accountability from prosecutors' offices and enable litigants to push for structural change.

In a recent complaint, attorneys from King & Spalding brought several charges against the San Francisco District Attorney's Office in the Northern District of California on behalf of Mr. Anh Lê, who was violently attacked in November 2019.[53] In that case, the district attorney's office flagrantly violated California's victims bill of rights, including the right to notice and an opportunity to be heard. Mr. Lê was not consulted before a lenient plea deal was negotiated with his attacker, and he was not afforded the opportunity to present his victim impact statement.[54]

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[50] At the federal level, 18 U.S.C. § 3771 provides certain rights at the federal level. 18 U.S.C. § 3771(a)(2) (conferring the "right to reasonable, accurate, and timely notice of any public court proceeding); 18 U.S.C. § 3771(a)(5) (providing the "reasonable right to confer with the attorney for the Government in the case."). The federal victims' protection statute expressly precludes a private right of action, and thus cannot provide recourse for individual victims. *See* 18 U.S.C. § 3771(d)(6).
[51] Cal. Const. art. I, § 28(b).
[52] N.Y. Exec. Law, art. 23 § 640.
[53] *See generally* Lê Complaint, *supra* note 1.
[54] *Id*. at 2.

Further, while California law guarantees victims protection from their attackers, Mr. Lê's protective order against his attacker had an incorrect name and age.[55] While Mr. Lê's claim was voluntarily dismissed for negotiation with the District Attorney's Office,[56] the complaint poses a helpful departure point to assess the viability of these claims and consider their broader applicability outside of San Francisco.

A. *Ex Parte Young* Suits as a Means of Seeking Injunctive Relief

Ex Parte Young suits are premised on an implied right of action to sue state officials for injunctive relief when a plaintiff alleges the officials have violated federal rights.[57] Importantly, when a plaintiff sues a state official in their official capacity, the official is unable to claim immunity defenses to *Ex Parte Young* actions.[58]

Mr. Lê's counsel filed under *Ex Parte Young*, noting that the San Francisco District Attorney's office violated two both equal protection and due process rights under the Fourteenth Amendment. First, the attorneys alleged that Mr. Lê was not afforded equal protection of laws because of the San Francisco District Attorney's failure to comply with Marsy's Law.[59] Second, Mr. Lê's attorneys argued that the San Francisco District Attorney's Office "policies, practices, customs, supervision, and training as they pertain to victims' rights have denied and continue to deny adequate procedural and substantive due process protections to Plaintiff."[60]

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[55] *Id*.
[56] *See* Notice of Dismissal of Action Without Prejudice, Lê v. Boudin, No. 3:22-cv-477 (N.D. Cal. Jan 24, 2022) ECF 27.
[57] *Ex Parte Young*, 209 U.S. 123, 123 (1908). This has been extended to local officials. *See, e.g.*, *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018).
[58] *Id*.
[59] Lê Complaint, *supra* note 37 at 26 (noting that the San Francisco District attorney "has failed to provide the due process guaranteed to victims under the California Constitution to Asian American victims of violent crimes, including failing to inform and consult these victims at critical stages and failing to allow them opportunities to be heard by courts.").
[60] Lê Complaint, *supra* note 1 at 29 (noting that "plaintiff was not provided with notice or an opportunity to be heard before being deprived of his rights by the DA's office.").

Given *Ex Parte Young* mandates injunctive relief, Mr. Lê's attorneys requested the court require the District Attorney's office to comply with Marsy's Law by instituting appropriate training, policies, and procedures.[61] The claims brought by Mr. Lê's counsel can likely be replicated when there are specific state or local laws that protect victims' rights. As held in *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, when a plaintiff demonstrates Constitutional rights are violated under *Ex Parte Young*, a district court has broad ability to provide an adequate equitable remedy.[62] Thus, a court is able to institute mandatory training or compliance with state policy.

There are, however, limits to the *Ex Parte Young* doctrine. First, the Second Circuit has noted that "relief in the form of reopening a closed criminal case to permit additional victim input at a resentencing…is retrospective in nature."[63] *Ex Parte Young* actions are unlikely to be effective in punishing the defendant in a single case. Instead, they will likely be most effective in working towards institutional change when victims' rights are systematically ignored.

Second, Supreme Court jurisprudence has narrowed the doctrine of *Ex Parte Young*.[64] In *Seminole Tribe*, the Supreme Court held that *Ex Parte Young* actions are unavailable when an alternative remedial scheme is available.[65] In *Seminole Tribe*, the remedial scheme was enacted by Congress. While there is no alternative federal remedy in these cases, *Seminole Tribe* leaves

[61] Lê Complaint, *supra* note 1 at 30.
[62] Swann v. Charlotte-Mecklenburg Bd. Of Ed., 402 U.S. 1, 15 (1971) (stating that "once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").
[63] Caruso v. Zugibe, 646 Fed. Appx. 101, 110 (2d Cir. 2016). In that case, plaintiff alleged that her coworker assaulted her and argued that a plea agreement was inappropriate. *Id*. However, the appellate court held that reopening the case did not comply with the "prospective" relief that *Ex Parte Young* suits require. *Id*.
[64] *See, e.g.*, Seminole Tribe v. Fla., 517 U.S. 44, 76 (1996); Whole Woman's Health v. Jackson, 141, S. Ct. 2494, 2495 (2021).
[65] Seminole Tribe, *supra* note 64 at 76 (stating that "the narrow exception to the Eleventh Amendment provided by the *Ex Parte Young* doctrine cannot be used to enforce [a federal statute] because Congress enacted a remedial scheme.").

open the question of whether a *state*-imposed remedy could preclude such a suit. This is unlikely to present glaring issues, given that most victims' bills of rights do not create private rights of actions or list private remedies to plaintiffs in these cases.

More recently, in *Whole Women's Health v. Jackson*, the Supreme Court narrowed when an officer can be sued under *Ex Parte Young*.[66] Specifically, post-*Whole Woman's Health*, litigants can only sue those officials who have enforcement power over a given statute. Of course, district attorneys do have the power to enforce victims' bills of rights. But given the newfound focus on enforcement, there may be a concern that *non*-enforcement of a state law without a private right of action are not justiciable under the narrowing doctrine of *Ex Parte Young*.

B. *Monell* Claims as a Means to Challenge Insufficient Training, Policies, and Practices

Litigants can state a claim under 28 U.S.C. § 1983 if they can allege "facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment."[67] The Supreme Court has condoned theories of municipal liability under *Monell* and its progeny.[68] Under *Monell*, an individual can sue a municipality for monetary, declaratory, or injunctive relief.[69] A litigant must demonstrate that an unconstitutional policy or practice is either formally or informally adopted by a municipality.[70] This "policy" can also be categorized as a "failure to train, supervise, and discipline [a municipality's] employees amounting to a deliberate indifference to a person's constitutional rights."[71]

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[66] Whole Woman's Health, *supra* note 64 at 2495 (stating that "the state has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly.").
[67] Monroe v. Pape, 365 U.S. 167, 171 (1961).
[68] Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).
[69] *Id*.
[70] *Id*.
[71] *City of Canton v. Harris*, 489 U.S. 378 (1989).

In *Lê v. Boudin*, Lê's counsel argued that failure to train and supervise employees led to a systematic violation of constitutional rights. The complaint points out that the systematic failure to enforce Marsy's Law resulted in a failure to protect Asian Americans.[72] Ultimately, Mr. Lê's counsel argued, the San Francisco District Attorney's lack of proper training and protocols led to a deprivation of rights for Mr. Lê and other Asian American victims.[73]

Monell claims are a particularly hopeful avenue because a plaintiff can demonstrate "deliberate indifference" towards Constitutional rights as evidence of a failure to train or properly supervise.[74] As discussed, prosecutors routinely treat Asian American hate crime victims with indifference when they try to report crime or follow up on the consequences their perpetrators will face.[75]

Monell claims may also pose certain evidentiary and statutory burdens. First, plaintiffs filing under *Monell* need to prove that a failure to train constitutes a "policy or practice" of a district attorney's office. This can be difficult when a plaintiff is alleging that a prosecutor violated only their personal rights under a victims bill of rights. Thus, *Monell* claims will be most effective in cases like San Francisco or New York, where law enforcement and prosecutors' offices have not made efforts to prosecute hate crimes despite a surge in such attacks. In those cases, a plaintiff can prove that failure to provide victims with notice and opportunity to be heard is a "policy or practice" of a prosecutors' department.

[72] Lê Complaint, *supra* note 1 at 6.
[73] Lê Complaint, *supra* note 37 at 6 (arguing that failure to properly train and institute strong protocols has deprived Mr. Lê—and other Asian Americans—of "the equal protection of the law, due process, and the rights, privileges, and immunities secured and protected by the United States Constitution.").
[74] *See* Monell, *supra* note 68 at 685 n. 45.
[75] For a discussion on prosecutorial indifference, *see infra* Section II.B.3.

Additionally, litigants must identify an "official policymaker" to file a claim.[76] This is unlikely to pose a large problem, however, given district attorneys have been viewed as policymakers in multiple circuits.[77] Thus, in jurisdictions where there is a clear failure to prosecute various hate crimes, *Monell* claims can demand accountability from district attorneys' offices.

C. Systemic Change Via Injunctive Relief or Settlement

By fashioning claims against prosecutors' offices, plaintiffs will aim at creating systemic change. These cases may not be resolved in court, but these broad policy goals lead to potential avenues for relief through settlement or mediation.[78] Hopefully, they will lead to (1) internal change through increased training and victims' resources; and (2) external change through increased community engagement.

First, these claims make way to advocate for increased training for district attorneys' offices. Many of the issues documented in addressing hate crimes reflect a lack of training. For example, in San Francisco's victim's advocates provided few of the resources guaranteed to victims following an attack. Likewise, in New York, those employed by the Manhattan or Queen's District Attorney's Office did properly identify hate crimes, sometimes implying that victims "instigated" the bias-based attacks. Training can likely address such lapses in communication, failure to identify biased-crimes, and disregard for procedure. Training should focus on how to prosecute and prevent hate crimes against Asian Americans specifically. For

[76] *See* McMillian v. Monroe Cty., 520 U.S. 781, 784 (1997) (stating that under *Monell*, a local government can be held liable for constitutional torts committed by "the government's lawmakers or by those whose edicts or acts may fairly be said to represent official policy."). In Lê's complaint, counsel noted that a District Attorney is a policymaker for local government in cases where plaintiffs are questioning an "administrative oversight of systems used to help prosecutors comply with their constitutional duties" thus leading to *Monell* liability. Lê Complaint, *supra* note 1 (citing Goldstein *v. City of Long Beach*, 715 F.3d 750, 762 (9th Cir. 2013)).
[77] *Id*. *See also* Bellamy v. City of New York, 914 F.3d 727, 760 (2d Cir. 2019) (finding that the Queens District Attorney qualifies as a city policymaker for training, supervising, and disciplining Assistant District Attorneys).
[78] *See* Notice of Dismissal of Action Without Prejudice, supra note 55.

example, AABANY has recommended "familiarizing government agencies and their employees with language translation tools" to make communicating with law enforcement agencies and prosecutors' offices more accessible.[79] Additionally, given the glaring inconsistencies in hate crime reporting and prosecution, it may be prudent to fund hate crimes units that can be more specifically trained to catch and prosecute these claims.[80]

An effective strategy will also focus on community engagement as an external resource.[81] Just as victims are afforded the right to notice, the Asian American community as a whole should be consulted in the fight against hate crimes. After all, these crimes affect more than the individual—as AABANY recognized, prosecutors' offices should understand the community has an interest in properly resolving hate crime cases. At the most basic level, the community can serve as a resource in fighting crime, providing insight that law enforcement and prosecutors would not otherwise have access to.[82] If individuals choose to negotiate with prosecutors' offices, they can request concerted efforts to build coalitions between the community, law enforcement agencies, and prosecutors' offices. State and local governments can look to resources publicized by the Department of Justice's Community-Oriented Policing Services (COPS) as a template for coalition-building.[83] While it does not appear COPS has facilitated engagement following anti-Asian American violence, the office's Initiative on Protecting Places of Worship coordinated partnerships between the Civil Rights Division, Department of Homeland Security, and the FBI following anti-Islamic rhetoric during the 2016 Presidential

[79] *Endless Tide Report*, *supra* note 36 at 55.
[80] *Endless Tide Report*, *supra* note 36 at 51 (calling for sufficient funding and full-time staffing of the NYPD's Asian Hate Crimes Task Force and of Hate Crimes Units within New York City DA's Offices).
[81] *Endless Tide Report*, *supra* note 36 at 45 (stating that "prosecutors' offices should recognize that hate crimes affect both the individual attacked and the community to which the individual belongs.").
[82] As the *Endless Tide Report* notes, a victim who does not speak English well may not understand a slur that is directed at her during a hate crime attack. However, other members of the community who are present may have heard and understood the slur. *Endless Tide Report*, *supra* note 36 at 52.
[83] *Id*.

Election.[84] Local prosecutors offices and law enforcement agencies can host similar dialogues, and engage the wide array of organizations dedicated to combating hate crimes against the Asian American community, including the Alliance for Asian American Justice, AABANY, and Stop Anti-Asian. These organizations have been outspoken in the wake of the pandemic and can serve as important resources in building a holistic approach to prosecuting and preventing hate crimes.

Conclusion

Prosecutorial accountability is an important step in addressing the systematic refusal to charge hate crimes against Asian Americans. In cases where prosecutors express routine indifference to hate crimes, suits questioning the Constitutionality of these actions—brought as *Ex Parte Young* or *Monell* claims—can hold prosecutors' offices to account. Hopefully, this will lead to recourse for individual victims, while also providing for institutional change through injunctive relief.

[84] Improving the Identification, Investigation, and Reporting of Hate Crimes, U.S. Dept. of Justice Community Oriented Policing Services (2020).

Applicant Details

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Applicant Education

BA/BS From	**University of Miami**
Date of BA/BS	**May 2012**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**December 15, 2022**
Class Rank	**25%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**The George Washington Law School Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 17, 2023

The Honorable Kiyo A. Matsumoto
U.S District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am a January 2023 George Washington University Law School graduate, and I am writing to apply for the judicial clerkship vacancy with your chambers during the 2025-2026 term. Enclosed is a copy of my resume, transcript, references, and writing sample. Arriving separately are letters of recommendation from Professor Bignami, Professor Brown, Professor Kirkpatrick, and Dean Matthew. Thank you for your consideration.

Respectfully,

Michael Matthiesen

MICHAEL MATTHIESEN

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EDUCATION

The George Washington University Law School — Washington, D.C.
Juris Doctorate, Health Law Concentration, GPA: 3.57, *with Honors* — Jan. 2023
Honors: *Top 5* of January 2023 graduating class, Dean's Certificate for *Most Pro Bono Hours* (424 Hours), Thurgood Marshall Scholar, HEERF Grant Recipient
Activities: Moot Court Board, 2021 Van Vleck Moot Court Competition (Top 3 Oral Advocates), Student Health Law Association, Health Rights Law Clinic, Faculty Appointments Committee

University College London — London, UK
Master of Arts, with Distinction, in Philosophy, Politics, and Economics of Health, GPA: 3.55 — Nov. 2015
Honors: Rotary International Global Grant Scholar, Goodenough College Member

University of Miami — Coral Gables, FL
Master of Science in Education, *with Graduate Honors in Community and Social Change,* GPA: 3.83 — Aug. 2014
Honors: 2014 Miami CCJ Silver Medallion, 2013 & 2014 Eli Segal Award, CNCS President's Call to Service Award

Bachelor of Arts in Political Science and International Studies, with Departmental Honors, GPA: 3.482 — May 2012
Honors: Bright Futures Scholar, Provost's Honor Roll, Dean's List, Pi Sigma Alpha Honor Society
Activities: Model United Nations, WVUM 90.5 FM Executive Board, Specialty Show Host, and Rotation DJ

EXPERIENCE

Baker McKenzie — Miami, FL
Associate Attorney, Litigation and Government Enforcement — Sept. 2023

U.S Securities and Exchange Commission — Washington, D.C.
Student Scholar, Division of Enforcement — Sept. 2022 – Nov. 2022
Research matters for the enforcement team on securities fraud and material omissions in cases involving crypto entities.

Baker McKenzie — Miami, FL
Summer Associate & Diversity Scholar — May 2022 – Jul. 2022
Researched matters for litigation team including FDA regulations, SEC compliance, and questions of state law.

The George Washington University Law School — Washington, D.C.
Research Assistant for Dean Dayna Matthew — Dec. 2020 – May 2022
Edited documents for publication and served as teaching assistant in the Race, Law, and Public Health course.

United States District Court for the District of Columbia — Washington, D.C.
Judicial Intern for The Honorable Royce Lamberth — Jan. 2022 – Apr. 2022
Researched and drafted orders on FOIA, January 6th proceedings, and the doctrine of consular non-reviewability.

Center for Disease Control & Prevention — Atlanta, GA
Public Health Law Intern — Sep. 2021 – Dec. 2021
Analyzed legal map of state public health laws to determine their impact on the spread of sexually transmitted diseases.

U.S Department of Health & Human Services, Office of Trade and Health — Washington, D.C.
Summer Law Clerk — Jun. 2021 – Jul. 2021
Researched the global approval of COVID-19 vaccines and how distribution interacts with U.S. laws.

Federal Public Defender's for the Southern District of Florida — Miami, FL
Legal Intern — Aug. 2020 – Nov. 2020
Conducted legal research, drafted compassionate release motions, and analyzed constitutional questions.

United States District Court for the Southern District of Florida — Miami, FL
Judicial Extern for The Honorable Cecilia M. Altonaga — Jun. 2020 – Jul. 2020
Conducted legal research and drafted orders on statutory interpleader, OFAC collections, and maritime law.

Miami Dade College — Miami, FL
Grant Coordinator, Advising & Operations — Sep. 2017 – Jun. 2020
Managed 25 employees, $500,000 budget, and related operations in compliance with U.S. Dept. of Education guidelines.

Adjunct Professor, Philosophy — Feb. 2016 – May 2020
Taught the "Introduction to Philosophy" and "Critical Thinking & Ethics" courses for 80+ students.

LANGUAGE SKILLS AND INTEREST: Conversational Portuguese; Beginner Spanish

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

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Date Issued: 03-MAR-2023

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Page: 1

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Admit Term: Fall 2020

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Current Major(s): Law
Concentration(s): Health Law

Degree Awarded: J D 06-JAN-2023
With Honors
Major: Law
Area of Concentration: Health Law

JD RANK: 5/18
MAY 2022 EQUIVALENT RANK 188/549

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2019-2020	Florida International Univ		
LAW 6202	Contracts	4.00 TR	
LAW 6206	Torts	4.00 TR	
LAW 6208	Property	4.00 TR	
LAW 6212	Civil Procedure	4.00 TR	
LAW 6216	Fundamentals Of Lawyering I	3.00 TR	
LAW 6217	Fundamentals Of Lawyering II	2.00 TR	
LAW 6218	Professional Responslbty/Ethic	3.00 TR	
Transfer Hrs: 24.00			
Total Transfer Hrs: 24.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2020			
Law School			
Law			
LAW 6209	Legislation And Regulation Kovacs	3.00	A-
LAW 6214	Constitutional Law I Cheh	3.00	A-
LAW 6410	Health Care Law Rosenbaum	4.00	A
LAW 6644	Moot Court-Van Vleck Johnson	1.00	CR
Ehrs 11.00 GPA-Hrs 10.00 GPA 3.800			
CUM 11.00 GPA-Hrs 10.00 GPA 3.800			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2021			
Law School			
Law			
LAW 6210	Criminal Law Braman	3.00	B+
LAW 6400	Administrative Law Bignami	3.00	B+
LAW 6411	Health Care Law Seminar Lynch	2.00	A
LAW 6617	Law And Medicine Suter	3.00	B+
Ehrs 11.00 GPA-Hrs 11.00 GPA 3.455			
CUM 22.00 GPA-Hrs 21.00 GPA 3.619			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Summer 2021			
LAW 6230	Evidence Kirkpatrick	3.00	A
LAW 6668	Field Placement	3.00	CR
LAW 6672	The Art Of Lawyering Grillot	2.00	B+
Ehrs 8.00 GPA-Hrs 5.00 GPA 3.733			
CUM 30.00 GPA-Hrs 26.00 GPA 3.641			
Good Standing			
Fall 2021			
LAW 6232	Federal Courts Gavoor	3.00	A-
LAW 6250	Corporations Mitchell	4.00	A-
LAW 6360	Criminal Procedure Lerner	3.00	B-
LAW 6631	Health Rights Law Clinic Jackson	4.00	P
Ehrs 14.00 GPA-Hrs 10.00 GPA 3.367			
CUM 44.00 GPA-Hrs 36.00 GPA 3.565			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			

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WASHINGTON, DC

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SSN : ***-**-4367
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Date of Birth: 04-OCT

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Record of: Michael P Matthiesen

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2022			
Law School			
Law			
Health Law			
LAW 6300	Federal Income Tax	3.00	A-
	Brown		
LAW 6380	Constitutional Law II	4.00	B
	Colby		
LAW 6592	Jurisprudence Seminar	2.00	A
	Steinhardt		
Ehrs	9.00 GPA-Hrs 9.00 GPA 3.444		
CUM	53.00 GPA-Hrs 45.00 GPA 3.541		
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Fall 2022			
LAW 6234	Conflict Of Laws	3.00	B+
	Berman		
LAW 6402	Antitrust Law	3.00	A-
	Kovacic		
LAW 6656	Independent Legal Writing	2.00	A+
Ehrs	8.00 GPA-Hrs 8.00 GPA 3.708		
CUM	61.00 GPA-Hrs 53.00 GPA 3.566		
Good Standing			

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	61.00	53.00	189.00	3.566
TOTAL NON-GW HOURS	24.00	0.00	0.00	0.00
OVERALL	85.00	53.00	189.00	3.566

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Katie Cloud
Interim University Registrar

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All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School
Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN
The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA
Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS
Undergraduate Grading System
A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System
(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System
A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System
H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

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The George Washington University Law School
2000 H Street NW
Washington, DC 20052

May 17, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in very enthusiastic support of Michael Matthiesen's application for a clerkship in your chambers. I have been fortunate to observe Michael as a student in one of my courses, as well as in his role as a leader in our academic community. His "A" work in my own class demonstrated that he has high intellectual capability, exceptional analytical skills, and an impressive ability to articulate his ideas both in writing and orally. These gifts make him perfectly suited for the work of your chambers.

Michael was a student in my spring 2022 Federal Income Taxation course. He approached me before classes started to indicate his complete lack of experience in the tax arena, but also to let me know of his deep interest in understanding legal systems and the ways in which tax law fit. Early on he expressed an intellectual curiosity that will serve him well in any area of law he chooses. Michael was able to not only parse through the minutiae of the Internal Revenue Code and to apply it to a given fact pattern to determine one or more possible outcomes, but he was also able to perceive the larger implications. For example, when we covered the disparate tax rate tables depending on marital status and the rules concerning transactions between married persons, he impressed our class with his perception that the tax rules were not neutral and could result in influencing the decision whether to marry in ways most likely not intended by Congress. I recall his similar contribution when we were discussing the constitutionality and feasibility of a wealth tax on the very wealthy. Michael's insight here was that the more fundamental fairness issues arose from the structure of a federal income tax system that delays the imposition of tax on certain property transactions and provides a preferential (reduced) rate when the income is ultimately subjected to tax. This observation reflected his very keen powers of analysis and his gift of looking at complicated structures in coherent way.

Michael was always enthusiastic and very-well prepared for class. He spoke regularly and effectively in class, often serving as a role model for the rest of the class. Michael has very strong personal skills and an easy ability to get along with students, faculty, and staff from all walks of life. He always exhibited respect and concern for other members of the community and worked hard to support those students in our class who found the challenge of the Federal Income Tax course to be daunting.

I have not been in a position to supervise lengthy writing projects for Michael, but I did take a look at his examination in my course in preparation for this letter. I found his essay answer to be very well-organized and written in a clear and persuasive manner. One of the examination questions required the students to address and resolve a novel question which was somewhat like issues covered in class, but also very different. His work product showed that he had engaged and grappled with the issues, examined appropriate routes of inquiry, and reached a confident conclusion that weighed the relative merits of possible approaches to a resolution, distinguishing pertinent authority from the rest. I believe this is the type of intellectual engagement and clear thinking that would make Michael a stellar clerk in your chambers.

I think very, very highly of Michael and his outstanding intellectual skills and abilities. He has my highest recommendation for a clerkship.

Thank you very much for considering my letter. Please feel free to contact me at karenbrown@law.gwu.edu or by phone at (202) 994-2538 (work) or (301) 537-3134 (cellphone) if you have any questions.

Sincerely,
Karen B. Brown
Theodore Rinehart Professor of Business Law

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

May 17, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in support of Michael Matthiesen's application for a clerkship in your chambers. Michael has a strong academic record and he is a dedicated and ambitious student. I am happy to give him my enthusiastic recommendation.

Michael was a student in the introductory administrative law course that I taught in spring 2021. As was the case for all GW Law courses, it was taught entirely on Zoom. In my view, the virtual format made what is already a challenging course even harder. Administrative law is not generally intuitive for students, especially for those, like Michael, without a background in an administrative agency, and the materials on the various federal programs covered in the case law can be quite dry—all of which is exacerbated in a large online class where there are potentially many distractions for students.

In this challenging environment, Michael's commitment to the course and to learning and mastering the materials was truly exceptional. He had a perfect attendance record, he always had his camera on (out of courtesy to the instructor), and he was always prepared to answer my questions during cold calls. Michael regularly attended my virtual office hours, where he asked insightful questions and sought to deepen his knowledge of the materials. Moreover, he has a pleasant and polite demeanor.

On the final exam, Michael's performance was solid: he received a B+, which placed him exactly in the middle of the mandatory curve (in a class of 68 students). For the purposes of writing this letter, I went back over his exam. Although he did not spot as many issues as some of his fellow students, his answers for the issues that he did spot showed an excellent grasp of the law, as well as polished writing skills.

Michael is an assiduous and gifted student who is driven to excel. I have every confidence that he will become a valuable member of the legal profession and that he will make the most of a clerkship to immerse himself in the demands and rewards of the profession and to contribute to the work of your chambers. Please feel free to contact me at fbignami@law.gwu.edu if you would like to speak further about his candidacy.

Yours sincerely,
Francesca Bignami

May 17, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I understand that Michael Matthiesen, a third year student at the George Washington University Law School, is applying for a position with you. He has requested that I send a letter of reference on his behalf, and I am more than pleased to do so.

Mr. Matthiesen was a student in my Evidence class this past summer. He was the student who demonstrated the greatest understanding of the subject and contributed the most to our classroom discussions. It came as no surprise to me that he wrote the best final examination and received the highest grade in the class—an A.
He has demonstrated similar academic excellence in his other classes. He has a 3.64 GPA, which ranks him in the top 16-35% of his law school class and qualifies him for recognition as a Thurgood Marshall Scholar. He also compiled an outstanding academic record prior to coming to law school. He received a Master's degree from University College London in 2015, with distinction in Philosophy, Politics, and Economics of Health; a Master of Science degree with honors from the University of Miami in 2014; and his Bachelor of Arts degree from University of Miami in 2012, where he was on the Provost's Honor Roll and the Dean's List.

He has also excelled in extra-curricular activities while in law school. He was recognized as one of the top three oral advocates in the Van Vleck Moot Court Competition, the school's most prestigious and competitive moot court activity. He served on the Moot Court Board and was appointed a student member of the Faculty Appointments Committee. In recognition of his outstanding abilities, the law school Dean, Dayna Matthew, selected him to serve as her personal research assistant both last year and this year.

Mr. Matthiesen has also had valuable legal experience outside of law school. He served as a Judicial Extern for the Honorable Cecilia M. Altonaga of the United States District Court for the Southern District of Florida, as a Legal Intern for the Federal Public Defender's Office for Southern Florida, as a Summer Law Clerk for the U.S. Department of Health & Human Services, and as a Public Health Law Intern for the Center for Disease Control and Prevention.

In short, Mr. Matthiesen is one of our most outstanding law students. He is highly intelligent, articulate, personable, and responsible. He is dedicated to service in the public interest. In my opinion, he would be an extraordinary judicial clerk and any judge fortunate enough to hire him will be more than satisfied. I am pleased to be able to recommend him highly and without reservation. If you need more information about this outstanding candidate, please don't hesitate to contact me.

Sincerely,

Laird Kirkpatrick
Louis Harkey Mayo Research Professor of Law
The George Washington University Law School
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The George Washington University Law School
2000 H Street NW
Washington, DC 20052

May 17, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Mr. Michael Matthiesen has asked me to write a letter in support of his application to serve as your judicial law clerk. I am pleased to do so and have seldom had the pleasure of writing more enthusiastically. As you may know, I have just become dean at the George Washington University Law School; Mr. Matthiesen is the first GW Law student I hired as a research assistant and teaching fellow. In the year we have worked together, I have learned that Michael Matthiesen embodies all that is quintessentially unique and excellent about GW Law students.

First, Mr. Matthiesen has extensive preparation in health law and policy that evince his thoughtful attention to building a deep fund of knowledge in several areas of the law while connecting the law to other fields of study. He has excelled at interdisciplinary study at multiple institutions of higher education in the United States and abroad. Beginning with his undergraduate preparation in Political Science and International Studies; continuing to his dual Masters degrees in Education and in Philosophy, Politics, and Economics of Health; and concluding most recently with his outstanding performance at GW Law, Mr. Matthiesen has consistently achieved the highest honors in all of his academic endeavors.

Second, in every setting, Mr. Matthiesen dedicates himself to applying the knowledge he has gained. He takes on formidable extracurricular activities that engage him in the lives of the institutions he attends as well as in the communities situated just outside the walls of the academy. GW Law students are characterized by their ability to integrate their studies with an understanding of the “real world” impact that law has on society. Mr. Matthiesen achieves this with a high level of intellectual sophistication and rigor that I have seldom seen in a law student.

I first met Mr. Matthiesen in October 2020 when he was a student host at a GW Law health law conference that introduced leading practitioners to students interested in the field. His well-rounded, intellectual curiosity caught my attention. While some other students’ inquiries focused on obtaining employment pointers, Mr. Matthiesen was one of the students who probed the nexus between theories and doctrines that inform the law, and the way that the practice of law incorporates those theories in order to improve society. For example, I was intrigued as I saw Mr. Matthiesen deftly and politely explore principles of social welfare theory concerning the social determinants of health with a speaker who had asserted her law firm’s transactional work reduced health inequality.

I was the beneficiary of Mr. Matthiesen’s superb research and analytical skills when, throughout the year, he provided extensive annotated outlines, briefs, and resources to help me craft the numerous, substantive speeches I gave about health law and policy. In the midst of a global pandemic that directly engaged my research interests, that was no mean feat. Mr. Matthiesen was able to keep up with preparing me to speak several times a month on topics that ranged from national vaccine policy, to the states’ regulations controlling public health emergencies, to recommendations for achieving the constitutional promise of equal protection for victims of the COVID-19 crisis. In addition, Mr. Matthiesen managed the formidable workload that came with being the course teaching fellow for a busy new law school dean. Here, Mr. Matthiesen’s prior experiences as an adjunct philosophy professor and senior academic and career advisor proved invaluable. He raised the quality of my course immeasurably not only because he is well-organized and possessed an extraordinary work ethic, but also because he is extremely well-read and generous toward his fellow students. I quickly learned that I was able to double the office hours available for my course simply because students were as happy to speak with Mr. Matthiesen as they were to speak with me!

I close with what may well be the most important observation I have made about Mr. Matthiesen this past year: he is an outstanding human being. I know this from his generosity with his time, which he manages well, his care and attention paid to the timely completion of every detail assigned to him, and also from the passion he displayed for disadvantaged groups whenever we spoke. But I also know this from the bits and pieces I learned about his family. I know few details about the burden Mr. Matthiesen carried caring for his mother, who is very ill, but what I learned proved just another of many examples that this young man is one of the most mature, accomplished, and capable law students that I have met in my 35 years in the legal academy. He will be an asset to your chambers. I highly recommend Michael Matthiesen to serve as your law clerk without any reservations or qualifications whatsoever

Sincerely yours,

Dayna Bowen Matthew
Dean and Harold H. Greene Professor of Law

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WRITING SAMPLE

The attached writing sample is a judicial order I drafted while interning with Judge Royce Lamberth. This is the final version of the order which was edited by Judge Lamberth and his clerks.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK C. TROTTER,

Plaintiff,

v.

CENTER FOR MEDICARE AND MEDICAID SERVICES,

Defendant.

Case No. 1:19-cv-2008-RCL

MEMORANDUM OPINION

Plaintiff Frederick C. Trotter sued the Center for Medicare and Medicaid Services ("CMS") under the Freedom of Information Act ("FOIA") to compel disclosure of two types of information: first, the domain portions of email addresses associated with CMS-registered healthcare providers, and second, the providers' corresponding national provider identification numbers ("NPI numbers"). *See* Compl., ECF No. 1. On February 8, 2021, this Court rejected the bulk of Trotter's arguments and granted summary judgment in part to CMS. *See Trotter v. Ctr. For Medicare & Medicaid Servs.*, 517 F. Supp. 3d 1 (D.D.C. 2021). But the Court found that CMS could not withhold the domains of providers who participate in electronic health-information exchange because this information is already disclosed to the public. *Id.* at 9. Accordingly, the Court granted partial summary judgment to Trotter for this narrow subset of the requested information.

Now, Trotter moves for attorneys' fees and costs under 5 U.S.C. § 552(a)(E)(i) for the results of his FOIA litigation. *See* Pl.'s Mot. For Att'ys Fees ("Pl.'s Mot."), ECF No. 37; Pl.'s Mem. in Support ("Pl.'s Mem"), ECF No. 37-12. CMS opposes. Def.'s. Opp'n, ECF No. 40. Trotter filed a reply in support of his motion. Pl.'s Reply, ECF No. 41-16. Upon consideration of

the parties' filings, ECF Nos. 37, 37-12, 40, 41, 41-16, applicable law, and the entire record herein, the Court will **DENY** Trotter's motion for attorneys' fees and costs.

I. BACKGROUND

Federal regulations require virtually every healthcare provider to register with CMS and obtain a unique identification number (the NPI number). *See generally* 45 C.F.R. ch. 162. To obtain an NPI number, providers must register with a database and provide certain contact information—including an email address. *See Trotter*, 517 F. Supp. 3d at 1. Trotter is a "journalist, data journalist, and part-owner and founder" at CareSet Journal. Frederick Trotter Decl. ¶ 1, ECF No. 37-1. In January 2014, Trotter submitted a FOIA request to CMS for the email addresses associated with each NPI number. *See Trotter*, 517 F. Supp. 3d at 1. CMS identified 6,380,915 active providers. *Id.* at 4. But CMS informed Trotter that it would withhold the full email addresses to protect the healthcare providers' privacy. *Id.* Trotter subsequently amended his request to ask only for the domains associated with each provider.[1] *Id.* CMS—again—asserted the providers' privacy interests and refused to release the domains. *Id.* After exhausting his administrative remedies, Trotter filed this lawsuit to compel CMS's disclosure of (1) the domain portion of the email address associated with each healthcare provider registered with CMS and (2) the NPI numbers associated with these addresses. *See id.*

On February 8, 2021, this Court granted in part and denied in part the parties' cross-motions for summary judgment. *Id.* at 9. First, the Court rejected Trotter's arguments that CMS's search for records was inadequate. *Id.* at 6. Next, the Court concluded that CMS had properly invoked the FOIA's privacy exception for withholding the domains of providers who do not participate in

[1] "An email address consists of a local-part, the '@' symbol, and a domain. For example, in the email address bevo@utexas.edu, 'bevo' is the local-part and 'utexas.edu' is the domain." *Trotter*, 517 F. Supp. 3d at 1 n.1.

health-information exchange (a digital records sharing program with CMS). *Id.* at 8. However, the Court ordered CMS to disclose the email domains of providers who participate in the health-information exchange because CMS already publicly discloses their information and "[these providers] no longer have an interest in maintaining the privacy of their domains." *Id.* at 7. Rather than receiving information for the 6,380,915 active providers that CMS identified, Trotter received only 203,939 lines of provider information. *See Trotter*, 517 F. Supp. 3d at 1; Frederick Trotter Decl. ¶ 19.

Trotter now moves for $189,685.85 in attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E)(i). CMS concedes that Trotter is eligible for attorney's fees under the FOIA, but disputes whether Trotter is entitled to a fee award. Def.'s Opp'n 5. Trotter filed a reply in support of his motion. Pl.'s Reply.

Trotter's motion for attorneys' fees is ripe for review.

II. LEGAL STANDARDS

The FOIA permits attorney-fee awards "to encourage [FOIA] suits that benefit the public interest." *LaSalle Extension Univ. v. FTC*, 627 F.2d 481, 484 (D.C. Cir. 1980). Accordingly, courts may assess against the United States attorneys' fees and other litigation costs reasonably incurred in any case when the complainant has substantially prevailed. 5 U.S.C. § 552(a)(4)(E)(i); *see Morley v. CIA (Morley II)*, 894 F.3d 389, 391 (D.C. Cir. 2018). Courts considering whether to grant attorneys' fees consider two prongs—eligibility and entitlement. *See Church of Scientology of Cal. v. Harris*, 653 F.2d 584, 587 (D.C Cir. 1981).

First, a court must determine whether the plaintiff is eligible for fees. This prong is not at issue here. The parties agree that Trotter "substantially prevailed" and is eligible for fees. Pl.'s Mem. 4; Def.'s Opp'n 5; *see Grand Canyon Tr. v. Bernhardt*, 947 F.3d 94, 95 (D.C. Cir. 2020)

(explaining that plaintiffs who "obtained relief" through a "judicial order, or an enforceable written agreement or consent decree" have "substantially prevailed" and are eligible for fees).

But Trotter's eligibility is not the end of the matter. The Court must determine whether Trotter is entitled to fees. *See Jud. Watch Inc. v. Dep't of Commerce*, 470 F.3d 363, 369 (D.C. Cir. 2006) (explaining that eligibility does not determine entitlement under the FOIA). The touchstone of this inquiry is whether an attorneys' fee award is necessary to implement the FOIA. *See Davy v. CIA*, 550 F.3d 1155, 1158 (D.C. Cir. 2008) (citing *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977)). Four factors guide this inquiry: "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents." *Tax Analysts v. Dep't of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992); *see Morley v. CIA (Morley I)*, 810 F.3d 841, 842 (D.C. Cir. 2016). "[T]he first three factors assist a court in distinguishing between requesters who seek documents for public informational purposes and those who seek documents for private advantage." *Davy*, 550 F.3d at 1160. The first category of requesters need a fee incentive to litigate, the latter do not. *Id.* The Court has discretion to balance these factors and determine a fee award. *See id.* at 1158.

III. DISCUSSION

The parties agree that Trotter is eligible for an attorney-fee award because he achieved a favorable result from this Court. *See Trotter*, 517 F. Supp. 3d at 9; Pl.'s Mem. 4; Def.'s Opp'n 5. The Court agrees and need not engage in an eligibility analysis here.

But the Court, weighing the four factors identified by the D.C. Circuit, finds that Trotter is not entitled to attorneys' fees. Trotter fails to identify a public benefit derived from this case and CMS acted reasonably in withholding the requested information. So, while Trotter's role as a data

journalist weighs in his favor, the Court finds, on balance, that Trotter has failed to establish his entitlement to attorneys' fees.

A. Trotter Has Failed To Identify A Public Benefit Derived The Case

The first factor that the Court weighs is "the public benefit derived from the case." *Kwoka v. IRS*, 989 F.3d 1058, 1063 (D.C. Cir. 2021). There are two components to the public benefit inquiry. The first analyzes the "effect of the litigation." *Morley I*, 810 F.3d at 844 (quoting *Davy*, 550 F.3d at 1159). The second—and more important component—"requires an *ex ante* assessment of the potential public value of the information requested." *Id.*

As to the effect of the litigation, this component focuses only on whether the litigation caused an agency to release the requested documents. *Morley I*, 810 F.3d at 844 (citing *Davy*, 550 F.3d at 1159). This FOIA litigation caused the release of 203,939 lines of information. *See Trotter*, 517 F. Supp. 3d at 7; Pl.'s Mem. 7. But the mere release of information is not sufficient to swing the public-benefit factor in Trotter's favor. *See Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995) (explaining that the public-benefit prong turns on "evaluat[ing] the specific documents at issue in the case at hand"). Moreover, the public already had access to much of this information. Any effect of Trotter's lawsuit was minimal.[2]

The second (and more important) component of the public benefit inquiry requires the Court to make "an *ex ante* assessment of the potential value of the information requested, with little or no regard to whether the documents supplied prove to advance the public interest."

[2] Trotter tries to gain additional mileage from this component by arguing that this case "provided CMS as well as its participants with clear judicial guidance as to what records health providers can expect to remain private, and others that are clearly designed to be public." Pl.'s Mem. 8. The Court is not persuaded. Even if this Court were to consider this argument here, it is a longstanding, established principle that "if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes" and the information must be released. *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999). It is hardly the case that the Court's holding in this litigation provided citizens with new or "better tools with which to obtain government information." Pl.'s Reply 8.

Morley I, 810 F.3d at 844. While "the release of any government document benefits the public by increasing its knowledge of its government . . . Congress did not have this broadly defined benefit in mind" when authorizing attorneys' fees in FOIA cases. *Cotton*, 63 F.3d at 1120. Instead, Trotter must show "at least a modest probability of generating useful new information about a matter of public concern." *Id.* This includes the possibility that citizens may use the information to make "vital political choices." *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979).

This second component swings the public-interest factor in favor of CMS. Trotter's fee request relies on many of the same arguments and conclusory statements that the Court previously determined were inadequate. For example, Trotter rehashes his claim that the obtained data provide insights into how CMS performs its statutory and regulatory duties and whether CMS is reducing "waste, fraud, and abuse." *Compare* Pl.'s Mem. 8, *with Trotter*, 517 F. Supp. 3d at 8. But like before, Trotter fails to "show a nexus" between the email domains and "how CMS addresses waste, fraud, and abuse." *Trotter*, 517 F. Supp. 3d at 8. Trotter states that the released data "make[] it simpler to test which provider-to-hospital relationship should be regarded as primary,"—which means the organization is "willing to spend money to enable the provider to exchange healthcare data using CMS-approved digital protocols." Pl.'s Mem. 8. One year on, this assertion is "speculative because he provides no reason to believe that a provider's domain has any connection to his primary organization." *Trotter*, 517 F. Supp. 3d at 9. Nor does Trotter explain how a domain link between an individual provider and their associated organization illuminates whether the organization is "willing to spend money to enable the provider to exchange healthcare data using CMS-approved protocols." Pl.'s Mem. 8, *see Trotter*, 517 F. Supp. 3d at 9 ("Trotter[] . . . does not explain how knowledge about a provider's primary organization leads to information about clinical

approach."). Finally, Trotter again fails to explain how the data obtained is useful to detecting waste, fraud, and abuse. *See Trotter*, 517 F. Supp. 3d at 9.[3]

Trotter's belated attempts to plug the holes in his sinking arguments cannot succeed. In his reply, Trotter explains how the domains were used in his study and provides a copy of the study itself. *See, e.g.*, Pl.'s Reply 5–8; Alma Trotter Decl. ¶¶ 22–29, ECF No. 41-1. Because he raised these arguments for the first time in his reply filings, they are forfeited. *See MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010). The Court could not consider them anyway, for this factor requires an "*ex ante* assessment" of potential value. *Morley I*, 810 F.3d at 844.[4]

Finally, Trotter contends that he "has demonstrated his ability to disseminate the information obtained by this litigation to a high degree" through his website, newsletter, and data sharing processes. Pl.'s Mem. 7. This argument does not affect the Court's public-benefit analysis. Nearly half of the information that CMS released was already available to the public. *See* Alma

[3] Trotter repeats his claims that the data will facilitate epidemiological studies, but he again fails to explain how those studies shed light on CMS's functions as opposed to public health issues in general. *See Trotter*, 517 F. Supp. 3d at 8 n.4.

[4] Even if Trotter overcame these two hurdles, the Court remains skeptical that Trotter can show a nexus between the released domains and the public interests that he identifies. Given the forfeiture, the Court will provide only a brief preview of potential issues here. Trotter appears to have used the domains' corresponding websites to conclude that thousands of providers receiving incentive funding from CMS do not permit patients to receive their healthcare records electronically. *See* Alma Trotter Decl. ¶¶ 24–29. But Trotter provides no explanation of the regulatory framework governing payments under CMS's incentive program. If individual providers receiving incentive payments must certify that they are complying with the program, why should the inquiry as to whether they provide patients with electronic access to healthcare records end with their associated clinical organization's website? *See* Alma Trotter Decl. ¶ 53; ECF No. 41-10 at 5. *See generally* Center for Medicare & Medicaid Services, Public Use Files, https://tinyurl.com/2uxndhry; Center for Medicare & Medicaid Services, Registration & Attestation, https://tinyurl.com/2sn69s8t, ECF No. 41-10. Presumably, providers receiving incentive payments as individuals may have their own methods of providing electronic access to records that are not related to an associated clinical organization. *See Trotter*, 517 F. Supp. 3d at 9.

And beyond patients' electronic access to healthcare records—which is the focus of Trotter's study—CMS's incentive program has other objectives. *See, e.g.*, Center for Medicare & Medicaid Services, Medicare and Medicaid Promoting Interoperability Program Basics, https://tinyurl.com/mw4rd465 (identifying "Electronic Prescribing, Health Information Exchange, and Public Health and Clinical Data Exchange" as additional objectives). At this juncture, Trotter fails to show how the funds identified are the subject of waste, fraud, and abuse when they may well be furthering CMS's additional objectives.

Trotter Decl. ¶ 53. And there is "no public interest" in releasing documents already provided to the public. *Hooker v. U.S. Dep't of Health & Hum. Servs.*, No. 1:11-cv-1276 (ABJ), 2013 WL 12468053, at *4 (D.D.C. Oct. 11, 2013).

For these reasons, the Court finds that the first factor weighs heavily in favor of CMS.

B. The Commercial Benefit to Trotter and The Nature of Trotter's Interests In The Records Sought Lean In His Favor

The second and third entitlement factors lean in favor of Trotter. These factors address whether Trotter had a "sufficient private incentive" to pursue his FOIA request even without the prospect of obtaining attorneys' fees. *McKinley v. Fed. Hous. Fin. Agency*, 739 F. 3d 707, 712 (D.C. Cir. 2014) (citing *Davy*, 550 F.3d at 1160). These factors "'generally' should weigh in favor of scholars and journalists 'unless their interest was of a frivolous or purely commercial nature.'" *Kwoka*, 989 F.3d at 1064 (quoting *Davy*, 550 F.3d at 1160–61).

Trotter does not have a personal or commercial interest in this case. Rather, he has acted within the scope of his professional role as a "data journalist." Pl.'s Mem. 1; Def.'s Opp'n 17. CMS does not contend that Trotter's scholarly interests are frivolous or purely commercial. Instead, CMS focuses on the structure of Trotter's business, CareSet Journal. *Id.* CMS argues that that because CareSet Journal's commercial arm is "tight[ly] link[ed]" with its journalistic arm, Trotter has personal and commercial interests in the information that are "sufficient to ensure the vindication of the rights given in the FOIA." *Id.* (citing *Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979)). The Court is not persuaded.

These two factors should "generally aid scholars and journalists even if, in some cases, they do not weigh strongly in a plaintiff's favor and therefore ultimately 'do little to advance [their] position' when weighing all four factors." *Kwoka*, 989 F.3d at 1064–65 (quoting *McKinley*, 739 F.3d at 712). Trotter rightfully points out that even if CareSet Journal receives a pecuniary benefit

from NPI numbers and domain names, journalistic efforts are special. *Kwoka*, 989 F.3d at 1064. Other news organizations might have "tight linkage" between their commercial and journalistic arms—but the D.C. Circuit and courts in this district have time and again recognized that these entities are "among those whom Congress intended to be favorably treated under FOIA's fee provision." *Davy*, 550 F.3d at 1162; *see WP Co. LLC v. U.S. Small Bus. Admin.*, 514 F. Supp. 3d 267 (D.D.C. 2021); *Washington Post v. U.S. Department of Defense*, 789 F. Supp. 423 (D.D.C. 1992). So too here. "[S]cholarly interest, regardless of private incentive, generally should not be considered commercial." *Kwoka*, 989 F.3d at 1065. Since CMS does not refute Trotter's role as a journalist (data journalist or otherwise), the Court will not treat his interest as commercial.

Accordingly, the Court finds that the second and third factors weigh in favor of Trotter. But while these factors weigh in favor of Trotter because of his uncontested status as a "data journalist," they do "little to advance [his] position when weighing all four factors." *McKinley*, 739 F.3d at 712.

C. CMS Acted Reasonably

The final factor cuts decisively in favor of CMS. This factor requires the Court to evaluate whether CMS "had a reasonable basis in law" for opposing disclosure and whether CMS was "recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *McKinley*, 739 F.3d at 712 (internal citations omitted). It is the agency's burden to show that it had a colorable or reasonable basis for not disclosing the material. *Edelman v. Sec. & Exch. Comm'n*, 356 F. Supp. 3d 97, 108 (D.D.C. 2019) (quoting *Davy*, 550 F.3d at 1163). "If the Government's position is correct as a matter of law, that will be dispositive. If the Government's position is founded on a colorable legal basis in law that will be weighed along with other relevant considerations in the entitlement calculus." *Davy*, 550 F.3d at 1162 (citations omitted); *see Kwoka*,

989 F.3d at 1159 (explaining that while "no one factor is dispositive . . . the court will not assess fees when the agency has demonstrated that it had a lawful right to withhold disclosure"). This inquiry focuses on the reasonableness of the agency's position throughout the litigation, even if the Court ultimately ordered disclosure. *See Edelman*, 356 F. Supp. 3d at 108.

CMS contends that, in response to Trotter's first request, it reasonably withheld the full email addresses of providers to protect their personal privacy. Def.'s Opp'n 12. Even Trotter seems to agree that CMS's initial assertion of the FOIA's personal-privacy exemption (Exemption 6) was reasonable because he amended his request from "the email addresses of the healthcare providers" to just "the domain names of all healthcare providers' email addresses." *Id.* at 8.

After considering Trotter's amended request, CMS again invoked FOIA Exemption 6. This Court agreed that CMS "demonstrated privacy interests in shielding the domains of providers who do not participate in heath-information exchange . . . [and Trotter] identified no public interest in disclosing them." *See Trotter*, 517 F. Supp. 3d at 9. CMS's decision to withhold most of the requested domains was not only reasonable, it was also correct. And Trotter is not entitled to fees where the government's actions were legally justified. *See Davy*, 550 F.3d at 1162.

The remaining issue is whether the other, wrongfully withheld domains affect how the Court balances this factor. They do not. Trotter's success in this litigation stems only from CMS's failure to segregate the 3.2% of domains for providers that participate in a health-information exchange. But Trotter does not appear to have argued—until this litigation—that CMS needed to segregate domains of providers that participate in health-information exchange from the other domains. Trotter's FOIA request did not distinguish between these two categories of domains. *See* ECF No. 23-6. Instead, Trotter focused his segregation arguments on whether CMS could segregate solo practitioners from all other healthcare providers. *See* ECF No. 25-1 at 9.

In light of these broad requests, the Court concludes that CMS's withholdings were reasonable. CMS implemented a global response rooted in sound FOIA principles, its policy notice in the Federal Register, and good faith. None of CMS's summary-judgment filings disputed the release of these specific domains or this particular issue. *Cf. Kwoka*, 989 F.3d at 1066. For the small subset of domains that were ultimately released, the Court agreed with CMS that there is *no* public interest in their disclosure. *See Trotter*, 517 F. Supp. 3d at 9. And in regard to the privacy interests at stake, the released data indicate that not all the domains of providers participating in information exchange were even previously available to the public. *See, e.g.*, Alma Trotter ¶ 51.

At bottom, the Court cannot say that CMS's position was unreasonable or that CMS's behavior was "recalcitrant" or "obdurate" when it was correct on the vast majority of its claims and the legal framework that was the focus of this litigation. *See People for the Ethical Treatment of Animals v. USDA*, No. 1:03-cv-195, 2006 WL 508332, at *5 (D.D.C. Mar. 3, 2006) (concluding that, if an agency prevails "on the majority of its [FOIA exemption] claims, its overall position was reasonable"). Based on its legal position, the Court concludes that CMS acted reasonably in its withholding. This factor weighs heavily in favor of CMS.

Upon consideration of the four factors, the Court finds that the balancing test weighs in favor of CMS and that Trotter is not entitled to attorneys' fees.

IV. CONCLUSION

Based on the foregoing, the Court will deny Trotter's motion for attorneys' fees by separate order.

Date: 3/24/22

Royce C. Lamberth
United States District Judge

Applicant Details

First Name	**Katherine**
Last Name	**McMullen**
Citizenship Status	**U. S. Citizen**
Email Address	**kmm475@georgetown.edu**
Address	**Address** **Street** **455 I Street NW, Apt. 606** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20001** **Country** **United States**
Contact Phone Number	**5408787987**

Applicant Education

BA/BS From	**Stanford University**
Date of BA/BS	**June 2016**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**June 7, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**The Georgetown Journal of Legal Ethics**
Moot Court Experience	**Yes**
Moot Court Name(s)	**GULC Beaudry Moot Court Competition (2021) - Semifinalist** **Federal Bar Association Thurgood Marshall Moot Court Competition (2022) - top 8 teams**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kamerick, Eileen
eileen.kamerick@gmail.com
(847) 846-3200

Satterthwaite, Emily
eas395@georgetown.edu

Keenan, Frances
keenan@abell.org
443-226-1237

Langevoort, Donald
langevdc@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Katherine McMullen
455 I Street NW, Apt. 606, Washington, D.C. 20001
(540) 878-7987 | kmm475@georgetown.edu

May 22, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

As an expected June 2023 graduate of Georgetown University Law Center, I would like to be considered for a 2025-2026 clerkship with your chambers in Brooklyn, New York. Having gained exposure to litigation through my prior professional experiences and future experience as an incoming litigation associate at Kirkland & Ellis in Washington, D.C., I am very interested in clerking in the Eastern District of New York because of the opportunity to observe a docket with vast exposure to government-facing litigation, including a wide-range of criminal prosecutions. I am particularly interested in working for your chambers because of your strategic vantage point in the Second Circuit and your background in prosecution—the Court must apply its precedents, but I want to learn how those precedents are considered alongside a deep understanding of the inequities that exist within the justice system.

I chose to attend Georgetown to begin my legal career because I wanted to spend my time meeting practitioners and learning how the law is applied practically, outside the classroom. Through internships, including with Judge Kelly at the U.S. District Court for the District of Columbia and Judge Crowell at D.C. Superior Court, I gained exposure to how attorneys operate in the real world, and spent time drafting motions and memoranda, alongside various research assignments to assist both litigators and judicial clerks as they prepared for trial. It is through these experiences that I decided I wanted to clerk—the opportunity to see how the law is decided in action, and the messiness of wrestling with precedent to create the best legal outcome is one I would value extensively.

Prior to coming to law school I also saw litigation up-close—I worked for the Abell Foundation, a nonprofit that had a portfolio investment embroiled in IP litigation in the USITC and district courts. I assisted with research for complaint story-crafting, deposition preparation, and privilege log work, among other trial and settlement documents associated with the litigation. Alongside this work on IP litigation at Abell, I worked for the Chair of the Baltimore County Sexual Assault Reform Task Force. Through this role I interviewed public lab directors across Maryland regarding their practices surrounding sexual assault forensic evidence kits, interfaced with law enforcement, the Baltimore County State's Attorney's Office and other stakeholders, and drafted sections of the final report that was released by the County Executive.

Clerking offers a singular opportunity to further develop my foundational understanding of how the law works in practice, and I am excited to apply for this opportunity with your chambers in Brooklyn. Enclosed please find my resume, list of references, law school transcript, and writing sample. Arriving separately through Oscar are letters of recommendation from Professors Donald Langevoort, Emily Satterthwaite, and Eileen Kamerick, along with a letter of recommendation from a prior supervisor of mine, Frances (Francie) Keenan of the Abell Foundation. I can be reached at kmm475@georgetown.edu or by phone at +1 (540) 878 7987. I look forward to hearing from you.

Best,

Katherine McMullen

KATHERINE MCMULLEN

455 I Street NW, Apt. 606, Washington, D.C. 20001 | (540) 878-7987 | kmm475@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, D.C.**
Juris Doctor — Expected June 2023
GPA: 3.62
Journal: *The Georgetown Journal of Legal Ethics*
Honors: Business Law Scholar, Cohort Four
Barristers' Council, Appellate Advocacy Division (Moot Court)
Exceptional Pro Bono Pledge Honoree
Activities: Peer Tutor for 1Ls (Civil Procedure) (Fall 2022)
Research Assistant, *The Georgetown Law Journal Annual Review of Criminal Procedure* (Summer 2021)
1L Representative, Corporate & Financial Law Organization (2020-2021)

STANFORD UNIVERSITY — **Stanford, CA**
Bachelor of Arts in International Relations — June 2016
Minor: Middle Eastern Languages, Literature & Cultures
Study Abroad Awards: Clinton Scholarship, American University in Dubai, United Arab Emirates (August-December 2014)
USDE Fulbright-Hays Fellowship Grant awarded by the University of Virginia for study at Yarmouk University in Irbid, Jordan (June-August 2014)
Activities: Stanford Women in Business, Board Member (2015-2016) & Other Roles (2012-2015)

EXPERIENCE

KIRKLAND & ELLIS — **Washington, D.C.**
Incoming Litigation Associate — Expected Fall 2023
Summer Associate — May 2022-July 2022
- Performed legal research, drafted memo on SEC rule, and reviewed documents for FCPA investigation

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA — **Washington, D.C.**
Judicial Extern, Chambers of the Honorable Timothy J. Kelly — January 2023-April 2023
- Performed legal research, drafted sections of opinions and drafted bench memo on contract issue

DEPARTMENT OF JUSTICE — **Washington, D.C.**
Volunteer Law Student Extern, Organized Crime and Gang Section — August 2022-November 2022
- Performed legal research and drafted motions on evidentiary and other issues

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA — **Washington, D.C.**
Judicial Extern, Chambers of the Honorable James A. Crowell IV — January 2022-April 2022
- Performed legal research, assisted with docket preparation, and drafted both sentencing and bench memos, including multiple memos for Incarceration Reduction Amendment Act (IRAA) cases

U.S. ATTORNEY'S OFFICE, DISTRICT OF COLUMBIA — **Washington, D.C.**
Volunteer Law Student Extern, Violent Crimes and Narcotics Section — September 2021-December 2021
- Performed legal research, redacted discovery documents, and drafted sections of motions

U.S. ATTORNEY'S OFFICE, DISTRICT OF MARYLAND — **Baltimore, MD**
Summer Law Student Intern — June 2021-July 2021
- Performed legal research, summarized witness testimony for use in appellate brief, and drafted sections of motions

ABELL FOUNDATION — **Baltimore, MD**
Analyst and Executive Assistant to the Senior Vice President — May 2017-October 2019; March 2020-August 2020
- Provided litigation support, including privilege log analysis, complaint story-crafting and Relativity discovery database research, for portfolio investment involved in intellectual property disputes in USITC and District Court
- Updated various competitor and market analyses for active direct investments, including those in the automotive powertrain, hydropower, and gasification technology spaces, and performed diligence for potential new investments
- Developed and implemented audit of over 200 sexual assault cases in Baltimore County; interviewed stakeholders and drafted sections of report on findings for release by County Executive

LORI SYSTEMS — **Nairobi, Kenya**
Executive Coordinator — November 2019-March 2020
- Developed pitch decks for use in high-level investor meetings and developed and implemented strategic partnership and internal operations strategies in collaboration with executive team

PLOUGHSHARES FUND — **Washington, D.C.**
Research Assistant — September 2016-March 2017
- Conducted in-depth nuclear weapons and security research to inform senior staff talking points and co-authored article on weapons transport regarding lack of security protocols during domestic transport of nuclear arms

COMMUNITY INVOLVEMENT & INTERESTS

- Georgetown University Pre-Law Society Mentor (2021-Present); Thread (thread.org) Head of Family (2017-2019)
- Nonfiction, culinary history, and fitness

Katherine McMullen List of References:

Frances (Francie) Keenan
Senior Vice President, Abell Foundation
Supervisor at Abell from 2017-2020.
keenan@abell.org
(410) 547-1300 (office main line)

Hans Miller
Trial Attorney, Organized Crime & Gang Section (OCGS), U.S. Department of Justice
Supervisor at OCGS, Fall 2022.
Hans.Miller@usdoj.gov
202-353-2099 (desk phone)

Professor Eileen Kamerick
Adjunct Professor of Law, Georgetown University Law Center
Professor for Corporate Boards Seminar, Spring 2023.
Eileen.kamerick@gmail.com (preferred)
Eak149@georgetown.edu (alternate)
(847) 846-3200 (cell phone)

Record of: Katherine M. McMullen
GUID: 819485445

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	22	Civil Procedure Aderson Francois	4.00	A	16.00	
LAWJ	002	22	Contracts Anna Gelpern	4.00	B+	13.32	
LAWJ	005	21	Legal Practice: Writing and Analysis Erin Carroll	2.00	IP	0.00	
LAWJ	008	21	Torts Paul Rothstein	4.00	B	12.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	41.32	3.44
Cumulative	12.00	12.00	41.32	3.44

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	003	22	Criminal Justice Shon Hopwood	4.00	B+	13.32	
LAWJ	004	22	Constitutional Law I: The Federal System Paul Smith	3.00	A-	11.01	
LAWJ	005	21	Legal Practice: Writing and Analysis Erin Carroll	4.00	A-	14.68	
LAWJ	007	92	Property Neel Sukhatme	4.00	B+	13.32	
LAWJ	1701	50	International Economic Law and Institutions Sean Hagan	3.00	A	12.00	
LAWJ	611	09	Corporate Compliance in the Financial Sector: Anti-Money Laundering and Counter-Terrorism Financing Jonathan Rusch	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	64.33	3.57
Annual	31.00	30.00	105.65	3.52
Cumulative	31.00	30.00	105.65	3.52

----------Continued on Next Column----------

Program Changed to:
Major: Law/Business Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	121	02	Corporations Robert Thompson	4.00	B+	13.32	
LAWJ	1491	03	Externship I Seminar (J.D. Externship Program) Alexander White		NG		
LAWJ	1491	125	~Seminar Alexander White	1.00	A	4.00	
LAWJ	1491	127	~Fieldwork 3cr Alexander White	3.00	P	0.00	
LAWJ	300	05	Accounting for Lawyers Kevin Woody	2.00	B+	6.66	
LAWJ	309	07	Congressional Investigations Seminar Robert Muse	2.00	B+	6.66	
LAWJ	421	05	Federal Income Taxation Emily Satterthwaite	4.00	A-	14.68	

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	45.32	3.49
Cumulative	47.00	43.00	150.97	3.51

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	126	05	Criminal Law Alicia Washington	3.00	A	12.00	
LAWJ	1372	05	Business Essentials: A Mini-MBA for Lawyers Stephen Hills	3.00	A-	11.01	
LAWJ	1492	41	Externship II Seminar (J.D. Externship Program) Tannisha Bell		NG		
LAWJ	1492	89	~Seminar Tannisha Bell	1.00	A-	3.67	
LAWJ	1492	91	~Fieldwork Tannisha Bell	3.00	P	0.00	
LAWJ	1512	05	Constitutional Litigation and the Executive Branch Joshua Matz	2.00	A-	7.34	
LAWJ	396	05	Securities Regulation Donald Langevoort	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	50.02	3.85
Annual	32.00	26.00	95.34	3.67
Cumulative	63.00	56.00	200.99	3.59

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	165	05	Evidence Michael Gottesman	4.00	A-	14.68	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	B+	9.99	
LAWJ	361	09	Professional Responsibility Philip Sechler	2.00	A	8.00	
LAWJ	397	05	Separation of Powers Seminar Paul Clement	3.00	B+	9.99	

----------Continued on Next Page----------

Record of: Katherine M. McMullen
GUID: 819485445

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	42.66	3.56
Cumulative	75.00	68.00	243.65	3.58

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	114	08	Corporate Finance	4.00	P	0.00	
LAWJ	1610	09	Criminal Practice Seminar: White-Collar Crimes in a Transnational Context	2.00	A-	7.34	
LAWJ	1830	05	Corporate Boards Seminar	2.00	A	8.00	
LAWJ	317	07	Negotiations Seminar	3.00	A	12.00	
LAWJ	351	05	Trial Practice	2.00	A	8.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	9.00	35.34	3.93
Annual	25.00	21.00	78.00	3.71
Cumulative	88.00	77.00	278.99	3.62

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 22, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a full-time member of the faculty at Georgetown University Law Center's and it is a pleasure to recommend Ms. Katherine McMullen, Georgetown Law '23, who has applied for a clerkship in your chambers. An active and engaged Georgetown student, Ms. McMullen is a member of the Moot Court team (Barrister's Council, Appellate Advocacy Division) and serves on the Georgetown Journal of Legal Ethics. I am confident that Ms. McMullen will be a wonderful law clerk and am delighted to support her application.

I got to know Ms. McMullen in the fall semester of 2021 when she was a 2L student in my upper-level Federal Income Taxation course. Ms. McMullen's performance in Federal Income Taxation was very strong: she earned an A- and was in the top half of the class. In class, she stood out from the beginning because she sat in the front row, was always meticulously prepared, and her performance on panel was stellar. When she wasn't on panel, she occasionally asked questions and their substantive quality was excellent. They were always on-point, well-articulated, and helped advance everyone's learning, thereby giving Ms. McMullen a well-deserved reputation in the class as a talented legal thinker and communicator.

Ms. McMullen also came to my attention on account of her initiative and the strength of her research and writing. In Federal Income Tax, students were permitted to choose a tax question of interest to them that we had not covered in the course and to write a short memorandum addressing it (for extra credit). Ms. McMullen seized the opportunity to do this and her memorandum was one of the strongest in the class. It asked the following: "How does the IRS treat filing for polygamous and other non-dyadic marriages (e.g., polyamorous relationships) in light of the recent decriminalization of polygamy in Utah and loosening of dyadic-centric domestic partnership requirements in certain domestic municipalities?" The answer provided in the memorandum was clear, thoroughly-researched and well-reasoned. It found that, unless such relationships are recognized as a "marriage" under state law, the IRS cannot treat the individual parties to the relationship as married for tax purposes. She concluded that until the Internal Revenue Code adopts a more expansive definition of what it means to be "married" under section 7701 and corresponding regulations, any given two members of a non-dyadic domestic partnership will be denied the benefits that a married couple can receive under the Internal Revenue Code, thus creating an inequity between these different kinds of legal relationships.

Ms. McMullen's background both before and during law school is impressive and well-suited to clerking. After completing her undergraduate studies at Stanford University and working for several years abroad and domestically, Ms. McMullen came to Georgetown Law. She was selected as a Business Law Scholar on account of her interest in studying business law through a litigation lens; she hopes one day to become a prosecutor. During law school, to advance this core interest, she has engaged a wide array of litigation experiences through externships and internships. These include placements in a judicial externship at the U.S. District Court for the District of Columbia (chambers of the Honorable Timothy J. Kelly), a volunteer law student externship at the Department of Justice (Organized Crime and Gang Section), a judicial externship at the Superior Court for the District of Columbia (chambers of the Honorable James A. Crowell IV), a volunteer law student externship at the U.S. Attorney's Office - District of Columbia (Violent Crimes and Narcotics Section), and a summer law student internship at the U.S. Attorney's Office - District of Maryland.

In addition to Ms. McMullen's academic skills and preparation, she is a kind and curious person. It is always a pleasure to interact with her inside and outside of class. In this regard, she is quick to use her many skills to help others. One example of this is her volunteer work with the organization Thread.org as a "Head of Family" to an at-risk Baltimore ninth grader.

In sum, Ms. McMullen is extremely well-qualified to be a clerk in your chambers and would be a marvelous addition to your community. Her combination of excellent analytical, research, and writing skills along with her interpersonal abilities make it easy for me to enthusiastically recommend her.

I would be happy to discuss further any aspect of this letter or Ms. McMullen's application. Please do not hesitate to contact me if I can be of assistance.

Sincerely yours,

Emily Satterthwaite

Emily Satterthwaite - eas395@georgetown.edu

ABELL
FOUNDATION

May 15, 2023

Dear Judge:

It is my pleasure to submit this letter of recommendation in support of Katherine McMullen's application for a federal clerkship. Katherine worked directly for me at the Abell Foundation for two and one-half years before attending law school

For over 35 years, I have served as the Chief Financial Officer and Senior Vice President for the Abell Foundation, a non-profit private foundation in Baltimore, Maryland, that is dedicated to fighting urban poverty. In addition, for the last 17 years I have served as the Executive Chairman of Paice LLC, a pioneer in hybrid car technology and an Abell investee.

Abell is a very innovative non-profit on multiple fronts: grant-making, social entrepreneurship and investments. Abell invests in promising local companies – including those focused on medical, technical and environmental advances – with the goal of creating local jobs and reinvesting any earnings back into the community. Consistent with this mission, Abell invested millions of dollars to promote Paice LLC's efforts to develop and promote its innovative-patented hybrid car technology. Abell has also made substantial investments in ThermoChem Recovery International (TRI). TRI's advanced steam reforming gasification technology can transform garbage into drop-in transportation fuel. Katherine worked side by side with me on both Paice and TRI during her time at Abell. Her responsibilities included assisting me in managing complex patent litigation between Paice/Abell and several global automotive manufacturers. She routinely interfaced with the patent lawyers and was a key team player during a very stressful and high stakes trial. Katherine earned the complete respect of the trial team. On TRI, Katherine assisted me with review and analysis of an offering memorandum for green bonds, the Independent Engineer's report and consultants' reports describing the first of a kind Municipal Solid Waste (MSW) to jet-fuel bio refinery.

Katherine has a rare gift of being able to immerse herself in the details but then step back to organize, analyze and present complicated information in a well-written form that is concise, persuasive and understandable. Her intellectual abilities along with her professionalism and maturity prompted me to include her in numerous high-level strategy meetings as well as Paice and TRI board meetings. She took on a wide variety of demanding and complex assignments and completed them in an exemplary manner. Her ability to keep confidential matters confidential was exemplary.

111 South Calvert Street Suite 2300
Baltimore, Maryland 21202-6174
Phone 410-547-1300
Fax No. 410-539-6579

Katherine has a thirst for knowledge and a passion for research that allow her to gain an in-depth understanding of complex matters. In addition to the key research she did for Paice and TRI, she co-authored an Abell Report titled "Fact Check: A Survey of Available Data on Juvenile Crime in Baltimore City." Katherine performed data analysis and conducted many in-person and phone interviews with stakeholders (a judge, academics, Office of the Public Defender, Department of Juvenile Services and the State's Attorney's Office). She also learned how to use and analyze a SQL database as part of this project. The report can be found on Abell's website and is an excellent example of the caliber of Katherine's work product.

Katherine works well in environments surrounded by smart people trying to figure out difficult problems. She handles ambiguity well and thrives in an environment that is constantly changing. Katherine prefers to learn by interning/doing rather than the classroom which is why, in part, she decided to attend Georgetown Law School.

Katherine has informed me that she would like to work for a private law firm for a few years, then clerk, and then switch into a public sector role, preferably with a federal prosecuting office. A clerkship would allow her the opportunity to wrestle with and learn how to apply the law each day for a dedicated year while further developing her writing skills. She believes that working for a judge to understand how the judge makes the "tough calls" in legal grey areas and weighs sentencing decisions while working with a small team is truly exciting.

Katherine is an amazing young woman and I truly believe a federal clerkship would complement her skillsets and contribute meaningfully to her continued professional growth and career development.

Frances M. Keenan

Frances M. Keenan
Senior Vice-President
Abell Foundation, Inc.

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 22, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Katherine McMullen has asked that I write to you in connection with her application for a judicial clerkship. Katherine was a student in my Securities Regulation class during her second year at Georgetown, and although the class was very large, I got to know her very well. Based on that contact and her stellar performance on the final exam, I recommend her to you with enthusiasm.

Katherine is a very focused, engaged law student, especially on matters relating to Her career interest, white-collar crime prosecution and litigation. She was selected to take part in Georgetown's innovative Business Law Scholars program, which adds various enhancements to a demanding business law curriculum. She has done internship/externship programs with the Department of Justice, judges in the District of Columbia and D.C. Superior Court, and U.S. Attorney's Offices in the District of Columbia and District of Maryland. She is exceptionally motivated, entirely in a good way. Her summer clerkship was with Kirkland & Ellis in its Washington D.C. office, which she will be joining full time as an associate after her Georgetown graduation.

I urge you to offer her an interview, so that you can observe for yourself Katherine's level of passion and knowledge. Wisely, she is committed to a district court clerkship for the professional skill building it would offer. Were you to hire Katherine as one of your clerks, you will quickly come to realize what an exceptional young professional she is. Please let me know if I can be of any further assistance.

Sincerely,

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law

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Writing Sample

The attached writing sample is the argument section of a brief I wrote when competing in the Beaudry Moot Court Competition at Georgetown University Law Center in 2021. The two questions discussed in the brief were: whether the legislative prayer doctrine applies to Hotung School District's school board meetings, and whether the prayer policy of that school district violates the Establishment Clause. The case took place on appeal from a hypothetical Thirteenth Circuit. The competition used a closed packet, and as part of the closed packet, certain reporter numbers and case names were modified. Thus, case names, reporter and page numbers may not correspond exactly to their real-life counterparts. The paper has not been edited by third parties and is my own work product.

SUMMARY OF ARGUMENT

The Hotung School District Board of Education's 2011 policy of solemnization of proceedings through an invocation falls under the Legislative Prayer Doctrine Exception to the Establishment Clause. The Establishment Clause of the First Amendment to the Constitution prohibits any government policy that effectively forces religion or religious practice onto its citizens. There is generally a clear line separating religious and state practice, with school-sponsored prayer almost universally illegal. There is a narrow exception, however, for invocations that begin sessions of legislative bodies. The exception exists largely because of the historical tradition of solemnizing proceedings through prayer, with case law including school boards within legislative bodies. Therefore, the Thirteenth Circuit correctly decided on appeal that Hotung's policy falls within the narrow legislative prayer exception because the Hotung Board centered its policy on solemnization, and historical tradition allows for such conduct.

Though the Board's conduct rightly falls within the legislative prayer exception, even if this Court disagrees, Hotung's policy survives scrutiny under the Establishment Clause analysis developed in *Lemon v. Kurtzman*. The analysis looks at a policy's purpose, primary effect, and whether or not it is an excessive entanglement of the government with religion. Hotung's express purpose for the policy was solemnization of school board meetings and promotion of the religious diversity of the district. Because of its secular purpose and dedication to removing the Board from direct decision-making regarding the content and provider of the invocation, the primary effect of the policy does not advance religion. In the same vein, because the Hotung Board has removed itself from direct control over the invocation, it has removed its policy from danger of excessive entanglement with religion.

ARGUMENT

I. The legislative prayer doctrine applies to the Hotung School District Board of Education's policy of community-sourced religious leaders conducting invocations at its meetings.

A. This case is a question of legislative body invocation—rather than of school prayer—because of the nature of the work of the Hotung Board and historical tradition governing similar practice.

"A single factual difference… can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition… The issue of prayer at school board meetings is no different." *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999). School-sponsored prayer is a per se violation of the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577 (1992) (finding religious exercises conducted at a public high school graduation ceremony are school prayer and thus violate the Establishment Clause). However, the practice of solemnization of a meeting of a legislative body with a religion-adjacent moment is a narrow exception to the general Establishment Clause doctrine. *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding the Nebraska Legislature's practice of opening each legislative session with a prayer by a State-remunerated chaplain does not violate the Establishment Clause); *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) (holding *Marsh* applicable to town board meetings). The courts have extended this traditional legislative prayer exception beyond state and federal legislatures, "to local deliberative bodies" like city councils and school boards, though the issue of the exception's applicability to school boards is still fact-sensitive. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (holding legislative prayer exception extends to local deliberative bodies like city councils); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017) (extends *Town of Greece* to prayers before school boards); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011)

(applies *Lee* to issue of school board meeting prayer led by board members); *Coles*, 171 F.3d at 377 (applies *Lee* to issue of school board meeting prayer conducted, at times, in a schoolhouse).

The Third, Fifth and Sixth Circuits have each examined whether prayer performed before school board meetings falls under the legislative prayer doctrine exception. *See, e.g.*, *Coles*, 171 F.3d at 369; *McCarty*, 851 F.3d at 521; *Indian River*, 653 F.3d at 256. In *Coles*, the Sixth Circuit held that prayer before meetings of the Cleveland School Board fell under *Lee* rather than *Town of Greece* because the meetings "are part of the same 'class'" as other activities like school graduation ceremonies and football games "in that they take place on school property and are inextricably intertwined with the public school system[.]" *Coles*, 171 F.3d at 377. Because board meetings are in this same class of activities, the Cleveland Board must be directing the entirety of its meeting's proceedings to its constituencies—the students. *Id.* The Sixth Circuit looked specifically to the audience and setting of the legislative activities of the Cleveland School Board in making the determination that *Lee* should govern the case. The Cleveland School Board conducted meetings on school property—even on occasion within a schoolhouse—which were attended by students who "[were] directly involved in the discussion and debate at school board meetings." *Id.* at 382. By comparison, in the present matter, Hotung's school board holds meetings in the District Administration Building or the local community theater, neither of which is a school. 548 F.4d at 206; 126 F. Supp. 4th at 138. The court in *Lee* noted it was issuing a limited ruling in response to the "sole question" of "whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform." *Lee*, 505 U.S. at 599. The issue in *Coles*, however, is of a more nuanced nature than the clear bright line ruling of *Lee*. Similarly, the Third Circuit in *Indian River* did not adequately substantiate why *Lee* held sway over the matter. *Indian River*,

653 F.3d at 270 (stating only "[h]aving decided that this case is controlled by the principles in *Lee v. Weisman*, we must next decide whether the Indian River Policy violates the Establishment Clause" without further substantiation). Further, as the Sixth Circuit noted in *Bormuth*, the Fifth Circuit has applied *Town of Greece* to prayers before school boards. *Bormuth*, 870 F.3d at 505 (citing *McCarty*). Therefore, since *Lee* is unconvincingly applicable to the present matter, the fact-sensitive inquiry typified in *Town of Greece* must govern.

B. A fact-sensitive inquiry into the Board's policy emphasizes the Board remains squarely within the legislative prayer exception and does not compel its citizens to religious observance.

Opening meetings of legislative bodies with prayer "is not subject to typical Establishment Clause analysis because such practice 'was accepted by the Framers and has withstood the critical scrutiny of time and political change.'" *McDonough Found.*, 126 F. Supp. 4th at 139 (quoting, in part, *Town of Greece*, 572 U.S. at 577); *Town of Greece*, 572 U.S. at 575 (noting the Court in *Marsh* "sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry," because of historical tradition). However, the prayers, or moments of solemnization, must not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Town of Greece*, 572 U.S. at 585. The principal audience of the prayers must also be the lawmakers themselves, and not the attending public. *Id.* at 587. In sum, the courts must perform a fact-sensitive inquiry examining the audience, setting, board influence on the prayer giver and prayer content, and historical tradition, in determining whether an organization has violated the legislative prayer doctrine and thus is forcing undue compulsory religious practice on its citizen. *Id.*

i. The audience of the Hotung Board's policy is primarily the board members.

The audience for a legislative prayer must be principally the legislatures themselves, rather than a secondary audience, though the secondary audience may be present. *Town of*

Greece, 572 U.S. at 587. Special consideration is also given to the presence of children at the proceedings, due to their vulnerability to peer pressure. *Lee*, 505 U.S. at 593; *McDonough Found.*, 548 F.4d at 210. However, as the Circuit Court noted, "the presence of students at board meetings does not transform this into a [*Lee*] school prayer case. There were children present at the town board meetings in *Town of Greece*… [and] the Court nonetheless applied the legislative prayer exception." *McDonough Found.*, 548 F.4d at 210. What is of great importance, however, is the actions of the board itself—if members of the board "directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity," then the policy would likely tip the inquiry against a legislative exception. *Town of Greece*, 572 U.S. at 587. The Hotung Board does no such thing—though there are students present at the meeting, the Board does not force any student into compulsory participation. Further, through the varied nature of speakers at the meetings, the two students who sit in on all Hotung Board meetings as members of the Student Advisory Council are not exposed to a continual march of one religion or prayer-type—they are exposed to the full diversity of offerings in the district, secular and non-secular.

ii. The setting of the Hotung Board meetings reiterates the separation of religious, school-day and governmental activity.

The Hotung Board conducts its meetings on non-school property either at a District Administration building or at a local community theater. For these reasons, the meetings are physically and sentimentally removed from the bounds of the school day, thereby providing a clear delineation between what is school and what is not school. Because of this clear line, Hotung satisfies this aspect of the *Town of Greece* inquiry.

iii. Hotung School Board remains multiple steps removed from the day-to-day selection of prayer giver and prayer content, thereby preventing its slide into school prayer territory.

The court looks to the activities of the legislative body as a whole when considering legislative prayer. *Lund v. Rowan Cnty., N.C.*, 837 F.3d 407, 421 (4th Cir. 2016). The identity of the prayer or invocation giver is generally "constitutionally insignificant;" rather, what is of significance is whether discrimination against certain speakers preventing their participation has occurred. *Id.* at 424. Further, "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Town of Greece*, 572 U.S. at 582. Finally, "'[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,' a constitutional line can be crossed… To this end, courts need only assure themselves that sectarian legislative prayer, viewed from a cumulative perspective, is not being exploited to proselytize or disparage." *Lund*, 837 F.3d at 421.

When examined holistically, Hotung's policy does not violate this inquiry. The Board's policy removes the Board from directly influencing the content of the prayers. It further removes the Board, in general, from the picking of religious leaders within the community to lead each meeting's invocation. It is only when a religious leader has not sought out the invocation spot at a particular meeting that the Board must name someone to give the invocation, and at that point the policy requires the Board to select a leader from the list at random. Further, the policy prevents religious leaders from speaking at consecutive meetings, thereby eliminating a key path to tipping the scales toward proselytization. The content of the invocations is not used to disparage other religions—though the content of the invocations is beyond the Board's control, the McDonough Foundation has not alleged the contents of the invocations disparage other

religions. Even if McDonough could point to a specific invocation or prayer that did disparage another religion, "*Town of Greece* 'requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.'" *Id.* at 422.

iv. Against the backdrop of historical tradition, Hotung remains firmly within the bounds of the legislative prayer doctrine.

The Thirteenth Circuit found that dating from the early 1800s—a time when the United States had hardly more than the thirteen original colonies it began with—"at least eight states had some history of opening prayers at school board meetings." *McDonough Found.,* 548 F.4d at 209. In *Bormuth*, the Sixth Circuit found that the "tradition [of legislative prayer] extends not just to state and federal legislatures, but also to local deliberative bodies like city councils" *and* school boards. *Bormuth,* 780 F.3d at 505 (referencing *McCarty,* 851 F.3d 521). Hotung "is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative. In no respect is it less a deliberative body than was the town board in *Town of Greece*." *McDonough Found.,* 548 F.4d at 208–209. Taken together, the Hotung Board is firmly within the legislative prayer doctrine because of the combination of the historically traditional practice of legislative prayer, and its application both to school boards specifically and schools boards by analogy (a legislature is a legislature is a legislature).

II. Even if this court finds the legislative prayer doctrine does not govern the present matter, the Hotung School Board is not in violation of the Establishment Clause as it satisfies *Lemon*.

A. The Lemon test governs as it is the go-to test this Court relies on in cases concerning school prayer.

To determine whether a matter violates the Establishment Clause, the courts look to *Lemon v. Kurtzman* and the so-called *Lemon* test: "a court must inquire (1) whether the government has the purpose of endorsing religion, (2) whether the effect of the government's

action is to endorse religion, and (3) whether the policy or practice fosters an excessive entanglement between government and religion." *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1982)). In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this court applied the "endorsement test" as opposed to the *Lemon* test. However, the endorsement test and the second prong of the *Lemon* test are virtually indistinguishable. *Indian River*, 653 F.3d at 282 (noting the endorsement test and the second *Lemon* prong are essentially the same, citing to *Black Horse Pike*, 84 F.3d at 1486); *Mellen*, 327 F.3d at 368 (holding the endorsement test is a refinement of *Lemon*'s second prong).

B. Hotung passes the first prong of the Lemon test because of the Board's policy's clear, secular purpose.

To apply the first prong of *Lemon*, "we ask 'whether [the] government's actual purpose is to endorse or disapprove of religion.'" *Indian River*, 653 F.3d at 283 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). The statute need not have exclusively secular objectives; "the 'touchstone' is neutrality" with the government only violating the Establishment Clause when it "acts with the ostensible and predominant purpose of advancing religion." *Mellen*, 327 F.3d at 742 (quoting *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005)). The secular purpose must be sincere and not a sham, with the board or government's stated purpose afforded some deference. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 (6th Cir. 2001) ("Unless it seems to be a sham... the government's assertion of a legitimate secular purpose is entitled to deference." *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265 (6th Cir. 2000)); *Indian River*, 653 F.3d at 283; *Mellen*, 327 F.3d at 372–73.

In the present matter, the policy's "stated purpose is the solemnization of Board meetings and honoring the diversity of religion in Hotung." *McDonough Found.*, 126 F. Supp. 4th at 138.

The District Court here decided because two Hotung board members had made statements using Christian concepts, "the prayer policy's provision for a solemnizing invocation does not constitute a permissible secular purpose," adding, "[t]here is no secular reason to limit the solemnization to prayers." *Id.* at 144. However, in *Mellen*, the Fourth Circuit held a policy of prayer before compulsory dinners at a state-funded university still passed the first prong of *Lemon*. In *Mellen*, the purpose of the prayer was to "promote religious tolerance, [educate] cadets about religion, and get 'students to engage with their own beliefs.'" *Mellen*, 327 F.3d at 373. The Fourth Circuit strongly expressed doubt about the stated purpose ("we are concerned") but afforded the policy's stated purpose deference, stating, "[w]e are inclined to agree that the purpose of an official school prayer 'is plainly religious in nature' ... however, we will accord [the government] the benefit of all doubt and credit [their] explanation of the prayer's purposes." *Id.* at 374. Hotung's stated aim is secular in rhetoric and in purpose. Therefore, this court should follow the case law, and affirm the Circuit Court's finding that Hotung's stated purpose does not violate the first prong of the *Lemon* test.

C. The primary effect of the Hotung Board's solemnization of proceedings does not advance religion, thereby green-lighting Hotung on the second prong of the Lemon test.

The second prong of *Lemon* demands that a governmental practice not advance or inhibit religion, regardless of its purpose. *Indian River*, 653 F.3d at 284; *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1380 (3d Cir. 1990). Objectively and through the viewpoint of a reasonable observer, the court examines the totality of evidence, including the "history and ubiquity" of the practice. *Indian River*, 653 F.3d at 284 (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)); *Mellen*, 327 F.3d at 374 (noting "this 'primary effect' prong must be assessed objectively"). The second prong asks "whether, irrespective of government's actual purpose, the

practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Mellen*, 327 F.3d at 374 (quoting *Wallace v. Jaffree*, 472 U.S. at 56 n. 42).

Hotung's practice of allowing community religious leaders to provide the invocation at the board meetings on a first come first served basis is the initial bulwark against a violation of the second prong of *Lemon*. By structurally distancing itself from the selection of the prayer-giver, Hotung effectively washes its hands of an endorsement or opposition of religion in the practice. This clear removal from influence is further strengthened by Hotung's method of adding religious leaders to its list:

> The Board compiles a list of eligible leaders by searching the internet, soliciting references from fellow community members, and consulting with the chamber of commerce. A religious leader may also request to be added to the list... The local fire department, law enforcement, and military installation chaplains are automatically added… The policy specifically states that the Board must make every possible effort to schedule a variety of religious speakers and no religious leader may speak at two meetings in a row.

McDonough Found., 126 F. Supp. 4th at 138.

The District Court in its ruling did not elaborate on its reasoning for why Hotung violated the second prong of *Lemon*. In *Indian River*, the school board began their meetings with a prayer, with the stated purpose to solemnize the proceedings. 653 F.3d at 261. The Third Circuit found in that case that "the largely religious content of the prayers would suggest to a reasonable person that the primary effect of the Policy is to promote Christianity," and thus violated the second prong of *Lemon*. *Id.* at 284. At first glance, the Indian River School Board and Hotung's Board seem to be two sides of the same coin, but there is a key difference distinguishing the two—the school board in *Indian River* rotated its prayer-giving through members of its board, while Hotung removed the act of prayer-giving from its board members in almost all circumstances. *Id.* at 262; *McDonough Found.*, 548 F.4d at 206; *McDonough Found.*, 126 F.

Supp. 4th at 138. Taken at the totality of circumstances level, to the reasonable observer, a rotating group of religious leaders does not convey the same endorsement as board members directly leading prayer. Further, in the legislative prayer context discussed previously, this Court has acknowledged that even a chaplain's sixteen-year consecutive term in prayer-giving before legislative body meetings is not enough to violate the Establishment Clause when the chaplain "was reappointed because [of] his performance and personal qualities [being] acceptable to the body appointing him." *Marsh*, 463 U.S. at 793. Therefore, Hotung's removal of the Board from direct decision-making, combined with the makeup of its list of speakers, and policy preventing consecutive meetings led by the same speaker, cement the Board's compliance with the second *Lemon* prong.

D. Hotung's solemnization of its meetings, through its content-neutral selection policies, does not result in excessive entanglement with religion thereby passing the third prong of Lemon.

The third prong of *Lemon* provides that a government practice may "not foster an excessive government entanglement with religion." *Indian River*, 653 F.3d at 288. Excessive entanglement entails an examination of the "character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)). "'The usual setting for an entanglement clause violation is when a state official… must make determinations as to what activity or material is religious in nature, and what is secular and therefore permissible' … A content-neutral access policy eliminates the need for these distinctions." *Gregoire*, 907 F.2d at 1381 (quoting, in part, *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 555 (3d Cir. 1984)). Entanglement is also limited to institutional entanglement. *ACLU of Ohio*, 243 F.3d at 308 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 689 (O'Connor, J., concurring)). However, some interaction between church and state has "always

been 'tolerated,'" therefore a complete separation is not expected. *Indian River*, 653 F.3d at 288 (quoting *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 534 (3d Cir. 2004) (Alito, J.)).

In *Coles*, a case in which the courts examined a school board's policy of beginning meetings with prayer, the Sixth Circuit found "excessive entanglement where '[t]he school board decided to include prayer in its public meetings, chose which member from the local religious community would give those prayers, and ... had the school board president himself compose and deliver prayers to those in the audience." *Mellen*, 327 F.3d at 374 (citing *Coles*, 171 F.3d at 385). No such issues are found in the case at bar. The president of the Hotung Board does not himself compose and deliver prayers to those in the audience. He does not ordinarily choose which members of the religious community lead the moments of solemnization. Further, the Hotung Board has historically begun its meetings with a solemnization proceeding and memorialized it in a policy after a period of time. *McDonough Found.*, 126 F. Supp. 4th at 138. The school board president in *Coles*, however, implemented the policy and proceeding simultaneously, effectively making the invocation of prayer a board decision. *Coles*, 171 F.3d at 373.

In *Gregoire*, the Third Circuit held that in order to not violate the Establishment Clause, the Centennial School District could not ban usage of its facilities "for religious purposes" because it would require the School District to illegally entangle itself in "what would almost certainly be complex content-determinations." 907 F.2d at 1382. The Third Circuit maintained a content-neutral access policy would alleviate this issue. *Id.* at 1381. Hotung has such a content-neutral approach, allowing it further freedom from an excessive entanglement clause violation.

For these reasons, Hotung has not violated the third prong of *Lemon*.

Applicant Details

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Applicant Education

BA/BS From	**University of Illinois-Urbana-Champaign**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 23, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Journal of Criminal Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William Minor Lile Moot Court Competition** **The Irving R. Kaufman Memorial Securities Law Moot Court Competition**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

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Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 1, 2023

The Honorable Kiyo Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

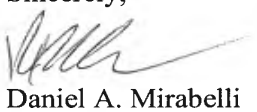
Dear Judge Matsumoto:

I am a second year Assistant District Attorney at the Manhattan District Attorney's Office and a 2021 graduate of the University of Virginia School of Law. I am writing to apply for a clerkship in your chambers in October of 2025. A clerkship in your chambers particularly interests me due to our shared experience as prosecutors and my strong desire to remain in New York and continue to build upon the professional and personal relationships I have forged here.

I am enclosing my resume, law school transcript, and a writing sample. You will also be receiving letters of recommendation from Assistant District Attorneys Samuel David ((347) 513-5661), Mary Ellen Nocero ((631) 793-3830), and Bethany Spiro ((212) 335-9245).

Please let me know if I can provide any further information. Thank you in advance for your time and consideration.

Sincerely,



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EXPERIENCE

Manhattan District Attorney's Office, New York, NY
Assistant District Attorney, September 2021 – Present

- Prosecuted over 400 felony and misdemeanor offenses ranging from white collar to violent crimes
- Tried three jury trials to verdict and indicted over ten cases through grand jury presentations
- Drafted over 500 criminal complaints, dozens of so-ordered subpoenas, and multiple 18 U.S.C. § 2703 orders
- Drafted over ten search and seizure warrants for electronically stored information, firearms, narcotics, social media, cellular sites, financial records, contraband, and scientific sample analysis
- Drafted over fifteen motions concerning dismissal, reargument, plea vacatur, and suppression

United States Attorney's Office for the Eastern District of Virginia, Richmond, VA
Legal Extern, January 2021 – May 2021

- Appeared in federal court for arraignment, initial appearance, and plea agreement hearings
- Drafted memoranda on issues including searches of electronically stored data, conflicts of law, and sentencing
- Drafted multiple responses to motions for compassionate release
- Researched topics including sentencing guidelines, scope of consent to search, and Hobbs Act issues
- Assisted in the preparation of evidence for COVID-19 relief fraud and observed reverse proffer

Charlottesville Commonwealth Attorney's Office, Charlottesville, VA
Legal Extern, September – December 2020

- Tried a felony jury trial to verdict as second chair utilizing a third-year practice certificate
- Prepared witnesses for trial, reviewed evidence, and prepared memoranda on various issues

United States Attorney's Office for the District of Maryland, Greenbelt, MD
Law Clerk, May 2020 – August 2020

- Drafted memoranda on Fourth Amendment issues, firearm trafficking venue, and Touhy regulations
- Conducted research on "ghost guns", wire fraud, obstruction of justice, and sentencing enhancements
- Reviewed search and seizure warrants for social media and email provider accounts in relation to wire fraud

Levine Bagade Han LLP, Palo Alto, CA
Summer Associate, June – August 2019

- Drafted multiple office action responses and continuing patent application claims for the U.S. Patent and Trademark Office that concerned a range of technical fields
- Analyzed client designs as compared to prior art to develop arguments for patent prosecution

Cook County State's Attorney's Office, Felony Trial Division, Chicago, IL
Law Clerk, January 2019

- Reviewed and organized evidence for homicide, sexual assault, and other felony cases

Navistar, Inc., Lisle, IL
Electrical Systems Engineer, May 2016 – July 2018

- Simplified complex electrical systems into wiring diagrams to be used by non-engineers
- Led team of four engineers to develop wiring diagrams for new vocational truck line

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., May 2021

- *Virginia Journal of Criminal Law*, Managing Board: Senior Articles Editor
- Extramural Moot Court, Director of Programs & Competitor

University of Illinois, Urbana-Champaign, IL
B.S., Mechanical Engineering, May 2016

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Major: Law

Beginning of Law Record

2018 Fall

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Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6000	Civil Procedure	B	4.0
LAW	6002	Contracts	B+	4.0
LAW	6003	Criminal Law	B+	3.0
LAW	6004	Legal Research and Writing I	S	1.0
LAW	6007	Torts	B+	4.0

2019 Spring

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6001	Constitutional Law	B+	4.0
LAW	6005	Lgl Research & Writing II (YR)	S	2.0
LAW	6006	Property	B+	4.0
LAW	6104	Evidence	B+	4.0
LAW	7160	Computer Crime	A	3.0

2019 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	7067	National Security Law	A-	3.0
LAW	7111	Con Law II: Survy/Civl Liberty	A-	3.0
LAW	9081	Trial Advocacy	B+	3.0
LAW	9182	International Law/Use of Force	B+	3.0

2020 January

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	7797	Sanctions and Boycotts (SC)	B	1.0

2020 Spring

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6106	Federal Income Tax	CR	4.0
LAW	7005	Antitrust	CR	4.0
LAW	7019	Criminal Investigation	CR	3.0
LAW	7071	Professional Responsibility	CR	2.0
LAW	7131	Criminology	CR	3.0

2020 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6103	Corporations	B+	4.0
LAW	6105	Federal Courts	B+	4.0
LAW	8622	Prosecution Clinic (YR)	CR	4.0

2021 Spring

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6102	Administrative Law	A-	4.0
LAW	7123	Class Actions/Aggregate Litgtn	A	3.0
LAW	7827	Global Bus & Corruption (SC)	A-	1.0
LAW	8623	Prosecution Clinic (YR)	B+	4.0

End of Law School Record

Lonna Hawthorne
UNIVERSITY REGISTRAR

New York County District Attorney's Office
1 Hogan Place
New York, NY 10013

June 8, 2023

To Whom It May Concern:

I write in strong support of Daniel Mirabelli's application to be a law clerk. Dan joined the Manhattan District Attorney's Office in 2021, serving in one of its trial bureaus, where I was a deputy bureau chief. I thus directly supervised Dan from 2021-2023, and closely observed his work. In 2023, I was promoted to be the bureau chief of another bureau, and sadly, am no longer working directly with Dan.

Dan is a skilled lawyer, with a keen intellect and abiding commitment to serving the public interest. During his time at the Manhattan District Attorney's Office, Dan quickly moved from handling misdemeanor cases to handling felonies. He was the lead attorney on a number of significant misdemeanor trials, including a "driving while intoxicated" (DWI) case and a "forcible touching" case where the defendant had nonconsensual contact with the victim's genitalia. Dan has been the "second chair" on some very serious felony cases, including a trial case in which the defendant attempted to push the victim onto subway tracks. On top of these trials, Dan has done extensive pre-arrest investigative work, including drawing up search warrants for residences, electronic devices, and social media profiles. His felony caseload has included domestic violence assaults, firearms possession, and other serious incidents.

As one of Dan's supervisors, I would regularly review the cases he picked up with him, discuss the factual and legal issues in the cases, and plan next steps. I found Dan to have an incisive intellect: he readily identified the key factual and legal issues in the cases he was assigned and thought carefully about next steps. Equally important, he operated from a balanced position in which fairness for defendants was a core guiding principle along with empathy and compassion for victims.

Dan's ability to cogently analyze cases was also manifest in his written work. He responded to numerous motions, some of which required substantial legal research. I supervised him on a New York State CPL 440.10 motion – a motion to vacate a conviction – that raised a novel issue: the defendant claimed his plea was not knowing and voluntary because he had not been informed that he would have to give a DNA sample. Dan thought carefully about the issues, delved into the case law, and wrote a convincing response. This is just one example of Dan's strong research and writing abilities.

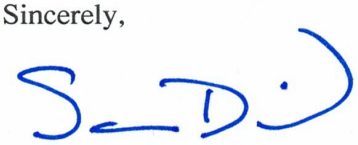
Dan's legal skills are matched by his ethic of public service. Prior to coming to the Manhattan District Attorney's Office, Dan had interned in state and federal prosecutorial offices in Virginia, Maryland, and Illinois. Through a program at the District Attorney's Office, Dan has been a high school mentor. In that capacity, Dan met with his mentee once a week to provide guidance on school and career choices and general support. Dan is also doing the "Inside Criminal

Justice" course in which prosecutors and convicted incarcerated defendants study criminal justice issues together and develop a joint policy proposal to improve the system.

On top of all these great attributes, Dan is a warm and well-regarded colleague who is never hesitant to pitch in for other attorneys when they need help with a case or a court assignment. He is a pleasure to work with and supervise, and I think he would be an excellent law clerk.

If I can answer any questions or be of any further help, please do not hesitate to contact me either via email at davids@dany.nyc.gov or phone at (212) 335-4084.

Sincerely,



Samuel David
Bureau Chief, Trial Bureau 80
New York County District Attorney's Office

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

ALVIN L. BRAGG, JR.
DISTRICT ATTORNEY

May 1, 2023

To Whom It May Concern:

It is with great pleasure that I recommend Daniel Mirabelli for a clerkship position in Your Honor's chambers. I am an Assistant District Attorney (ADA) at the New York County District Attorney's Office and I have had the privilege of supervising Daniel since the fall of 2021.

I was Daniel's Criminal Court Supervisor (CCS) during his first year working as an ADA, from the fall of 2021 through the summer of 2022, and throughout that time I supervised Daniel's work on all of his misdemeanor cases and investigations Now, as Supervising Attorney in the Sex Crimes Unit, I supervise his work on misdemeanor sex crimes cases. Daniel's responsibilities include carrying a caseload of approximately 100 cases, including but not limited to domestic violence, sex crimes, driving while intoxicated, assaults, thefts, and forged instruments. His work on these cases includes thoroughly investigating them by gathering evidence and meeting with witnesses, then finding a just resolution or litigating the case at trial. Daniel also handles pre-arrest investigations, which require him to determine what, if any, charges can be proven, decide whether to authorize an arrest, and handle the case moving forward if an arrest is made.

From day one, Daniel stood out from his class of eight ADAs in our Trial Bureau. He is passionate about the work he is doing, often volunteering to take on additional cases and investigations and working late nights and weekends when necessary. More importantly, his oral and written litigation skills are far above what is expected for a junior ADA. He has successfully orally argued issues regarding orders of protection, has tried cases to verdict, and has presented cases to the grand jury. Daniel has also successfully litigated a variety of pre-trial and post-trial issues in written motions. As his supervisor, whenever a complicated legal issue arises or investigation needs to be assigned, I am confident that he can handle the work and he quickly became one of my go-to ADAs. He is also a mentor to the younger ADAs and provides them with excellent guidance and advice on their cases and investigations.

Daniel's incredible work ethic and passion will serve him well in a clerkship. I strongly recommend him for the position in Your Honor's chambers. Please do not hesitate to contact me if you would like to discuss Daniel's qualifications further.

Sincerely,

Bethany Spiro

Bethany Spiro
Assistant District Attorney
(212) 335-9245

DISTRICT ATTORNEY
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ONE HOGAN PLACE
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(212) 335-9000

ALVIN L. BRAGG, JR.
DISTRICT ATTORNEY

April 24, 2023

To Whom it May Concern,

It is my distinct pleasure to recommend Daniel Mirabelli for a clerkship within your chambers. I have had the pleasure of supervising Mr. Mirabelli since he joined the Manhattan District Attorney's Office in September 2021. In that time, I watched him grow into a knowledgeable attorney and valuable member of our Trial Bureau.

As Mr. Mirabelli's Criminal Court Supervisor, I have observed Mr. Mirabelli to be a dedicated advocate and a thoughtful investigator. He is a critical thinker and I trust him to thoroughly investigate his cases in a professional manner. I have had the opportunity to watch him passionately advocate for his cases during a jury trial. He was able to elicit detailed testimony from his witnesses and was able to artfully weave the facts of his case into a compelling narrative for the jury.

In addition to his courtroom skills, Mr. Mirabelli has excelled as a legal researcher and writer. With the change in the discovery laws in New York in 2020, our ADAs have had to pivot in our standard motion practice, responding to novel arguments by the defense bar. Mr. Mirabelli has proven himself to be an invaluable resource to our Trial Bureau, understanding how to craft thorough responses. I have relied on Mr. Mirabelli's comprehension of the new laws and judges' interpretation of them in order to guide his colleagues in their motion practices.

On a personal note, I find Mr. Mirabelli to be a kind and empathetic individual who always displays a positive attitude even on our most difficult days. Mr. Mirabelli is the first person to volunteer to help his colleagues and is a reliable team member. I have no doubt that Mr. Mirabelli will continue to excel as he pursues new opportunities in his career.

I strongly recommend Daniel Mirabelli for a clerkship. If you have any questions or would like to further discuss this outstanding candidate do not hesitate to contact me at (631) 793-3830.

Sincerely,

Mary Ellen Nocero

Mary Ellen Nocero
Assistant District Attorney
(631) 793-3830

Writing Sample

The attached writing sample is a portion of a motion was filed with a Supreme Court of the State of New York by myself in my capacity as an Assistant District Attorney. It is a response to a defendant's motion for vacatur of the defendant's plea and sentencing, and dismissal of the indictment against him. Following the People's response, the defendant's motion was denied in its entirety and the defendant was compelled to provide a DNA sample. The portion attached concerns only vacatur of plea and sentencing, and was lightly edited by a supervising attorney, Assistant District Attorney Samuel David, one of my recommenders.

MEMORANDUM OF LAW

Despite the prolonged discussions with Defendant which resulted in an offer of a plea to misdemeanor assault in the third degree on an indicted felonious assault in the first degree, Defendant now seeks to vacate his plea and seeks dismissal of all charges. Defendant's motion must be denied in its entirety.

I. The Defendant's Guilty Plea was Voluntary, Knowing, and Intelligent because a DNA Sample is Not a Component of Sentencing.

a. Failure to Pronounce Non-Components of a Sentence Prior to a Plea Does Not Deprive Defendant of a Voluntary, Knowing, and Intelligent Decision.

A defendant who enters a guilty plea must voluntarily and intelligently waive several federal constitutional rights, namely, the right to a trial by jury, the right to confront one's accusers and the privilege against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238 (1969). *see* Exhibit D.[1] It is well settled that a guilty plea will be upheld if it was entered voluntarily, knowingly, and intelligently. *People v. Tyrell*, 22 N.Y.3d 359, 365 (2013). However, a guilty plea will not be invalidated solely because the trial judge fails to specially enumerate all the defendant's rights and elicit a list of detailed waivers. *Id.* Further, trial courts retain broad discretion in plea allocutions and need not follow a "rigid catechism". *Id.* at 366. Rather, the record must as a whole contain an affirmative demonstration of the defendant's waiver of his fundamental constitutional rights. *Id.* When the record shows that the defendant consulted with his attorney about the

[1] All cases are attach in the order that they appear in Exhibit D.

constitutional consequences of a guilty plea, a valid waiver may be established. *Id.* at 365 (*see North Carolina v. Alford*, 400 U.S. 25 (1970)).

The Court of Appeals has been clear that if a consequence of a conviction is not a component element of sentencing, a court's failure to pronounce the consequences prior to an entry of a guilty plea does not deprive the defendant of making a knowing, voluntary, and intelligent decision. *People v. Hoti*, 12 N.Y.3d 742 (2009); *cf. People v. Catu*, 4 N.Y.3d 242 (1984). The distinction between a component and non-component of a sentence lies within the statutory text, location of the statute within the code, and whether it is a punitive measure. *People v. Guerrero*, 12 N.Y.3d 45 (2009); *People v. Sparber*, 10 N.Y.3d 457, 468-69 (2008); *People v. Nieves*, 2 N.Y.3d 310, 316 (2004). For example, the consequence of post-release supervision is a component element of a sentence; however, orders of protection are not component elements of sentencing. *Sparber*, 10 N.Y.3d at 468-69; *Nieves*, 2 N.Y.3d at 316. Therefore, a judge is required to pronounce the terms of the post-release supervision, but not the order of protection. *Sparber*, 10 N.Y.3d at 468-69; *Nieves*, 2 N.Y.3d at 316. At the time *Sparber* was decided, Penal Law § 70.45, included the words "as a part thereof" in reference to the relation of post-release supervision and a determinate sentence. 10 N.Y.3d at 468-69. In contrast, CPL § 530.13(4) – the statute governing orders of protection – did not characterize orders of protection as being a component of sentencing. *Nieves*, 2 N.Y.3d at 316. Thus, post-

release supervision is a component element of sentencing, the Court ultimately, found, while orders of protection are not.

Furthermore, through this statutory analysis, the Court held that fees including the mandatory surcharge, crime victim assistance fee, sex offender registry fee, and DNA databank fee found in CPL § 60.35(1) are not components of sentencing. *Guerrero*, 12 N.Y.3d at 48-49; *People v. Hoti*, 12 N.Y.3d 742 (2009).

Beyond statutory analysis, the Court has relied upon the purpose of consequences to pleas. *Guerrero*, 12 N.Y.3d at 48-49. It is particularly relevant whether the consequence is an additional punishment component of a sentence. *Id.* For example, CPL § 60.35 was enacted as a revenue-raising bill. *Id.* As such, the fees are not punitive and are not a component of sentencing. *Id.* In the same vein, orders of protection are not punitive, but rather are measures to assist victims and witnesses. *Nieves*, 2 N.Y.3d at 316.

If a consequence of a plea is not a component of a sentence, the failure to pronounce them prior to entry of a defendant's plea does not deprive the defendant of the opportunity to enter a plea of guilty knowingly, voluntarily, and intelligently. *People v. Hoti*, 12 N.Y.3d 742 (2009); *cf. People v. Catu*, 4 N.Y.3d 242 (1984). Therefore, if the defendant is not advised of the mandatory surcharge, crime victim assistance fee, sex offender registry fee, and DNA databank fees prior to entering a plea, his plea is still considered knowing, voluntary, and intelligent. *Hoti*, 12 N.Y.3d 742.

b. Provision of a DNA Sample is Not a Component of Sentencing.

Per Executive Law § 995-C(3)(a), "Any designated offender subsequent to conviction and sentencing for a crime . . . shall be required to provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index".[2] The Second Department has addressed the precise question the defendant's motion now raises and has held that the requirement to provide a DNA sample is not a component element of a defendant's sentence. *People v. Cooks*, 107 A.D.3d 734 (App. Div. 2d Dept. June 5, 2013). Therefore, there was no requirement that this Court inform Defendant of the provision of a DNA sample, and the Court not doing so does not make Defendant's plea infirm.

The holding of *Cooks* – that the provision of a DNA sample is not a component element of a sentence requiring discussion during a plea – was more recently upheld in *People v. Rana (Zahid)*. 2015 NY Slip Op 51029(U) (App Term, 2nd Dept, 2015). In *Rana*, the defendant said nothing that would raise a question as to his guilt or whether the plea was less than knowingly, intelligently, and voluntarily entered, and he admitted that he was pleading guilty because he was, in fact, guilty of the offense charges. *Id.* at 2. On the same day, the matter was recalled, after the defendant refused to provide a DNA sample,

[2] EL § 995-C(4) then directs commissioner of the division of criminal justice services, in consultation with other agencies to promulgate rules and regulations governing the procedures for notifying designated offenders of the requirements of the State DNA identification index.

and the Court informed the defendant that providing the DNA sample was mandated by law. *Id.* Defendant thereafter filed a motion to vacate the plea, and the court rejected the motion, reaffirming the holding of *Cooks*. *Id.* Therefore, the failure to inform the defendant of the requirement to provide a DNA sample prior to his plea does not impact whether it is voluntarily entered. *Cooks*, 107 A.D.3d at 735.

Defendant relies upon *People v. Gravino* and *People v. Peque* to argue that the requirement to provide a DNA sample is a direct consequence, and if it is not a direct consequence, it is a unique collateral consequence worthy of an allocution. 14 N.Y.3d 546 (2010); 22 N.Y.3d 168 (2013). This reliance is misplaced, as there is recent Appellate Division case law directly on point squarely holding the opposite. Nor is the holding of Cooks and Rana unreasonable. To contrary, it is clear that the requirement to provide a DNA sample is not a consequence that fits within the direct and collateral consequence framework. This is because provision of the DNA sample is not punitive. To begin, unlike both the statutes in Sparber and Nieves, the statute governing the State DNA identification index does not reside within the Penal Law. Rather, it resides within the Executive Law, and simply directs that a DNA sample shall be required to be provided ***subsequent to*** sentencing. This language clearly designates that the DNA sample provision is not a component of the sentencing, but rather follows sentencing, similarly to the imposition of surcharge fees and the like.

Beyond the statutory language, the State DNA identification index was not created to punish defendants. Similar to the order of protection evaluated in *Nieves*, the database is a measure to assist law enforcement. The inclusion of one's DNA profile within the State Index is no more a punishment than the retention of fingerprints taken when a person is arrested, undergoes a background check, or voluntarily provides as a student pursuant to NYC Administrative Code § 14-118.1. The fingerprints of every person who is processed after an arrest are obtained, and if convicted those fingerprints are retained and utilized to make subsequent arrests if those fingerprints are found in connection to a separate crime. The fact that the fingerprints lead to a person being held responsible for their crimes against society does not make their provision a punishment. The same holds for the provision of a DNA sample. As such, this Court should follow the guidance of the Second Department and hold that the provision of a DNA sample is not a component of sentencing and as such does require an allocution for the defendant's plea to be knowing, voluntary, and intelligent.

c. Provision of a DNA Sample is Not a Direct Consequence of Conviction.

Even if it was determined by this Court that the provision of a DNA sample does fall within the direct and collateral consequence framework, an assertion directly rejected by the Appellate Division, Second Department, and which the People respectfully submit this Court should also reject, the failure of the Court to inform Defendant of the DNA sample requirement does not cause his plea to be involuntary. While a court must

advise the defendant of the direct consequences of a plea, a court is generally under no obligation to apprise the defendant of collateral consequences of a plea. *Peque*, 22 N.Y.3d at 184. Direct consequences have a definite, immediate, and largely automatic effect on the defendant's punishment. *People v. Ford*, 86 N.Y.2d 397, 403 (1995). Alternatively, collateral consequences are those which are peculiar to the individual's personal circumstances and not within the control of the court system. *Id.* Examples of direct consequences include the forfeiture of trial rights, imprisonment, and post-release supervision. *Peque* at 184. By contrast, collateral consequences include the loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess firearms, imprisonment upon revocation of post-release supervision, sex offender registration under the Sex Offender Registration Act, and civil confinement. A noteworthy component of EL § 995-C(3)(b) is detailed guidance as to the collection of DNA samples depending on various circumstances, of which the court has no discretion.

A notable exception among collateral consequences which requires a specific allocution by a trial judge is that the defendant must be informed that if they are not a citizen of the United States of America, they may be deported as a result of a guilty plea. *Id.* at 193. Deportation is an automatic consequence, and the deportation process deprives the defendant of an exceptional degree of physical liberty by first detaining and then forcibly removing the defendant from the country. *Id.* at 192. The creation of this